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—*Commercial TV Stations*
MM Docket No. 83-670

Advertising, Program Length Commercials

(See: Advertising, Excess Commercials-*Commercial TV Stations*)

Announcement, Commercial

(See: Advertising, Excess Commercials-*Commercial TV Stations*)

Application for Review

Application for review of Mass Media Bureau rulings which denied Fairness Doctrine Complaint denied. Complainant failed to establish (1) need issue, (2) current controversial issue, and (e) whether evidence submitted was properly evaluated.

—*Yes to Stop Callaway Committee*

Business Radio Service, Frequencies

Memorandum Opinion and Order adopted affirming Private Radio Bureau's deletion of 800 MHz channels for failure to meet the loading requirements of Rule 90.366(d).

—*Texas Two-Way, Inc.*

CATV Carriage, Mandatory Signal

Petition for declaratory ruling and petitions for reconsideration of Commission decision granting authority to carry a UHF television broadcast station with mandatory carriage rights on the expanded portion of a cable system's basic tier denied.

—*Monterey Peninsula TV Cable*

On remand from Court of Appeals in light of new facts, previous decision denying waiver of mandatory signal carriage rules affirmed.

—*Quincy Cable TV, Inc.*

CATV Carriage, Must Carry Signal

(CATV Carriage, Mandatory Signal-*Monterey Peninsula TV Cable*)

CATV Jurisdiction Over, By Local Municipality

Denied requests for reconsideration of prior declaratory ruling. One petition late-filed, another petition filed by party not participating below without adequate justification. Remaining petitioners failed to show procedural error in granting ruling, nor that Commission erred in finding competitive market for video services.
—*Community Cable TV, Inc.*

CATV Jurisdiction Over, By State Authority

(See: CATV Jurisdiction Over, By Local Municipality-*Community Cable TV, Inc.*)

CATV Special Relief, Denied

(CATV Carriage, Mandatory Signals-*Quincy Cable TV, Inc.*)

Cellular Communications Systems

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covers more area and population overcomes opponent's slight preference for its usage sensitive rate structure (not rate levels). No preferences awarded for applicants' analysis of demand or for ability to accommodate local or roamer demand and for the proposed systems expansion plans.
—*American Mobile Communications*
CC Docket No. 83-3

Commission affirmed its Decision granting cellular nonwireline application to the applicant whose proposed system covers more area and population; identified and analyzed demand more reliable and designed its system based on its analysis of demand.
—*MCI Cellular Telephone Co.*
CC Docket No. 82-796

Commission affirmed grant of nonwireline cellular construction permit to applicant that proposed to serve greater area and population; provided more reliable analysis of extent and distribution of demand; demonstrated superior ability to accommodate local demand for service; and proposed more flexible plan for system expansion.
—*Rogers Radiocall, Inc.*
CC Docket No. 82-721

Common Carrier, Accounting Regulations

Order established proper accounting for an antitrust judgment and clarified the accounting and disclosure requirements for the litigation costs and interest expense associated with the judgment.
—*AT&T*

Common Carrier, Data Processing Service

Computer II subsidiaries of BOCs permitted to act as sales agents for affiliated telephone company-provided intrastate basic services. Sale agency plans are expected to be in the public interest and consistent with the policy and objectives of *Second Computer Inquiry.*

—*American Information Tech. Corp.*

Common Carrier, Financial Reporting Requirements

Second Notice of Proposed Rulemaking adopted on proposed modifications to and simplification of Comsat's Form M and Form 901 reporting requirements.

—*COMSAT*

CC Docket No. 80-634

Common Carrier, Interconnection, Customer-Provided

(See: Common Carrier, Data Processing Service-*American Information Tech. Corp.*)

Common Carrier, International

Notice of Inquiry adopted requesting comments on policy alternatives for the distribution of circuits among North Atlantic facilities in the 1985-1991 period.

—*Common Carrier Facilities*

CC Docket No. 79-184

Common Carrier, Interstate

Proposed tariffs filed to bring AT&T's Long Distance Message Telecommunications Service and Wide Area Telecommunications Service, its switched interstate services, into compliance with divestiture of Bell System and to reflect the impact of exchange carriers' access tariffs.

—*AT&T Communications*

CC Docket No. 83-1145

Common Carrier, Intrastate

(See: Common Carrier, Data Processing Service-*American Information Tech. Corp.*)

Common Carrier, Mobile Radio

Applications for developmental authority granted in part to operate for hire two-way mobile radio stations using a modulation technique called amplitude compandored single sideband (ASSB), and employing frequencies interstitial to those already used by existing wireline

common carriers. In light of the prohibition against interference to existing services caused by developmental systems, Commission stipulated that market testing could follow only after successful demonstration of electromagnetic compatibility with existing Public Land Mobile Service stations.
—*Contemporary Communications Corp.*

Common Carrier, Rates, Charges

Report and Order adopted to recodify Part 61 of Rules, governing tariffs. Part 61 has been rewritten to conform formal tariffing requirements to contemporary telecommunications industry. Part 61 implements Section 203 of Communications Act. Part 1 is a simple relocation of a procedural requirement for consistency and ease of reference.
—*Amendment of Parts 1 and 61*
CC Docket No. 83-992

Fifth Report and Order adopted providing forbearance from tariff and facilities-authorization filings for domestic satellite, miscellaneous common, and digital electronic message service carriers.
—*Competitive Common Carrier*
CC Docket No. 79-252

Community, Ascertainment of Needs

(See: Advertising, Excess Commercials-*Commercial TV Stations*)

Comparative Criteria

(See: Cellular Communications Systems-*American Mobile Communications*)

(See also: Cellular Communications Systems-*MCI Cellular Telephone Co.*)

(See also: Cellular Communications Systems-*Rogers Radiocall, Inc.*)

Comparative Hearing

(See: Cellular Communications Systems-*American Mobile Communications*)

(See also: Cellular Communications Systems-*MCI Cellular Telephone Co.*)

(See also: Cellular Communications Systems-*Rogers Radiocall, Inc.*)

Competition, Common Carriers

Order adopted granting transfer of control of U.S. Telephone, Inc.'s licenses and authorizations to United Telecommunications, Inc. Acquisition of U.S. Telephone, Inc., an interexchange carrier, by

United Telecommunications, Inc., primarily an exchange carrier, found to promote competition. DTS applicants granted thirty days after their merger to decide which DTS application to pursue.
—*United Telecommunications, Inc.*

(See: Common Carrier, Rates, Charges-*Competitive Common Carrier*)

Computing Device

Order denied further reconsideration concerning amendment of Part 15 of the Rules relating to methods of measurement of radio noise emissions from computing devices. Measurement procedures for determining compliance with these regulations are set forth in FCC Measurement Procedure MP-4, which were developed by Report and Order and Memorandum Opinion and Order in this docket.
—*Amendment of Part 15*
Gen Docket No. 80-284

Order denied petition for rule making to exempt digital electronic organs from the computing device rules under Part 15, Subpart J. Computing devices are any electronic piece of equipment which utilizes digital functions with clock frequencies in excess of 10 kHz. Regulations limiting the interference potential of computing devices were adopted through the proceedings in Docket Nos. 20780 and 80-284, notably technical standards and equipment authorization programs.
—*CBS, Inc.*

Proposal responds to a petition requesting exemption from technical and administrative requirements for computing devices sold in unit quantities of 300 or less per year, and for computing devices used in engineering and scientific development facilities.
—*Computing Devices*
Gen Docket No. 84-801

Comsat, as common carrier

(See: Common Carrier, Financial Reporting Requirements -*COMSAT*)

Construction Permit, Modification of

Applications for modification of CP to establish an interim direct b/c satellite system granted, provided permittee demonstrates due diligence in construction of its satellite. Petitions and objections to modifications granted in part and denied in part.
—*CBS, Inc.*

Control, Transfer of, Authorized
(See: Competition, Common Carriers-*United Telecommunications, Inc.*)

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(See: Advertising, Excess Commercials-*Commercial TV Stations*)

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(See: Common Carrier, Mobile Radio-*Contemporary Communications Corp.*)

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(See: Competition, Common Carriers-*United Telecommunications, Inc.*)

Equipment Authorization Program
(See: Computing Device-*Amendment of Part 15*)

(See also: Computing Device-*Computing Devices*)

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Report and Order adopted amending Part 73 to reflect Commission's policy that broadcast licensees be encouraged to upgrade their facilities in order to better serve their audiences. Commission would be able to modify, in the course of rule making proceedings, the licenses of FM stations to a higher class of channel as well as licenses of UHF TV stations to VHF channels in the same community in a fashion that would offer interested parties an opportunity to apply for similar channels in the community.
—*Amendment of Part 73*
MM Docket No. 83-1148

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(See: CATV Jurisdiction Over, By Local Municipality-*Community Cable TV, Inc.*)

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Proceeding remanded to explore allegations of misconduct relating to financial qualifications.
—*California B/Cing Corp.*
BC Docket No. 80-698

FM Station

(See: Facility, Modification-*Amendment of Part 73*)

Frequency Allocation

Order adopted amending Part 2 of the Rules to provide a nonGovernment allocation in the 2285-2290 MHz band, which allows nonGovernment space operations access to the Tracking and Data Relay Satellite Systems.
—*Amendment of Part 2*

Frequency Allocation

Memorandum Opinion and Order denied Petitions for Reconsideration which request that the 2310-2390 MHz band be allocated on a secondary basis to the amateur service. Current bands allocated to amateur service are adequate to meet amateur service spectrum requirements.
—*Amendment of Part 2*
Gen Docket No. 80-739

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(See: Frequency Allocation-*Amendment of Part 2*)

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(See: Business Radio Service, Frequencies-*Texas Two-Way, Inc.*)

Frequency Loading

(See: Business Radio Service, Frequencies-*Texas Two-Way, Inc.*)

Instructional Television Fixed Service

Report and Order adopted amending certain technical and nontechnical rules regarding Instructional TV Fixed Service (ITFS). These changes will provide ITFS licensees with additional operational flexibility. In addition, certain administrative burdens are eliminated by simplifying licensing procedure and extending license term.
—*Amendment of Part 74*
MM Docket No. 83-523

Instructional TV Fixed Service (ITFS)
Further Notice of Proposed Rule Making adopted soliciting comments on the following: the nature and scope of permissible ITFS service; eligibility requirements, control of ITFS facility; procedural standards; procedures/criteria for mutually exclusive applicants; and interference protection standards.
—*Instructional TV Fixed Service*
MM Docket No. 83-523

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Logs, Retention of
(See: Advertising, Excess Commercials-*Commercial TV Stations*)

Main Studio Location
Review of action denying application to move main studio of unbuilt TV station to the transmitter site denied. With the abolition of *de facto* reallocation policy, greater importance placed on maintenance of main studio within community of license, and locating a main studio 7 miles beyond a city 2½ times as populous as the community of license is inconsistent with FCC's licensing rules.
—*Holt-Robinson of Texas, Inc.*

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(See also: Cellular Communications Systems-*MCI Cellular Telephone Co.*)

(See also: Cellular Communications Systems-*RogersRadiocall, Inc.*)

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(See also: Computing Device-*Computing Devices*)

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Tariff, Regulations of

Report and Order adopted to recodify Part 61 of Rules, governing tariffs. Part 61 has been rewritten to conform formal tariffing requirements to contemporary telecommunications industry. Part 61 implements Section 203 of Communications Act. Part 1 is a simple relocation of a procedural requirement for consistency and ease of reference.

—*Amendment of Parts 1 and 61*
CC Docket No. 83-992

FCC 84-353

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 1 and 61 of the Commission's Rules	CC Docket No. 83-992

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1984; Released: October 9, 1984

BY THE COMMISSION:

I. Introduction

1. On October 5, 1983, the Commission released a Notice of Proposed Rulemaking[1] (NPRM) proposing a recodification and revision of Part 61 of the Commission's Rules, 47 C.F.R. § 61.1 *et seq.*, and a single amendment to Section 1.773 of Part 1, 47 C.F.R. § 1.773. Part 61 provides the procedures that common carriers must follow when filing tariffs with the Commission pursuant to Section 203 of the Communications Act of 1934, 47 U.S.C. § 203. This recodification and revision represents the first overall review of these rules since 1939. It eliminates unnecessary regulations, clarifies remaining regulations and adopts more flexible

[1] Amendment of Parts 1 and 61 of the Commission's Rules, 95 FCC 2d 45 (1983).

procedural options which will ease carriers' compliance burdens. These revised rules will enable the Commission to meet its statutory oversight obligations while allowing subject carriers to operate more efficiently and to respond more effectively to competition. After careful consideration of the comments filed in this proceeding, we conclude that this revision of the rules, substantially as proposed, will benefit the public interest.

2. Eighteen parties filed comments in response to our NPRM, and thirteen parties filed reply comments.[2] These comments generally favored the proposed revisions of Part 61. The majority of the comments pertained to the proposed notice period reductions and customer notification requirements in Section 61.58, the increase in exemption amount for Section 61.38 submissions, and the tariff posting requirement in Section 61.72. The comments did not address all of the proposed revisions, but several commenters suggested further changes to certain rules. These proposals will be discussed in the following paragraphs in a section-by-section review. Appendix A contains the final text of the rules as amended.[3]

II. Analysis

3. *Section 61.12 (a), (b)* and *(f):*[4] *Definitions of concurring carrier, connecting carrier, and other participating carrier.* In the NPRM, we clarified the "concurring carrier" definition and added definitions of

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[2] The following parties filed comments: American Broadcasting Companies, Inc., National Broadcasting Company, Inc. and CBS Inc. (Networks), American Telephone and Telegraph Company (AT&T), Association of Data Processing Service Organizations, Inc. (ADAPSO), Bell Operating Companies (BOCs), Communications Satellite Corporation (COMSAT), FTC Communications, Inc. (FTCC), GTE Service Corporation (GTE), Home Box Office, Inc. (HBO), International Communications Association (ICA), MCI Communications Corporation (MCI), Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company and Northwestern Bell Telephone Company (U S West), National Telephone Cooperative Association (NTCA), RCA Communications, Inc. (RCA), Satellite Business Systems (SBS), Southern New England Telephone Company (SNET), Tele-Communications Association (TCA), United States Telephone Association (USTA) and Western Union Telegraph Company (Western Union). Reply comments were filed by: Aeronautical Radio, Inc. (ARINC), Alascom, Inc. (ALASCOM), AT&T, ADAPSO, BOCs, ICA, Networks, MCI, RCA, SBS, Teltec Saving Communications Co. (Teltec), U S West, and Western Union.

[3] Appendix A contains the final text of Part 61 rules. Appendix B contains the single rule amendment of Part 1. Appendix A includes Section 61.40 which was added to the Commission's Rules in Private Line Rate Structure and Volume Discount Practices, CC Docket No. 79-246, FCC 84-147, released April 24, 1984, 49 Fed. Reg. 18,107 (April 27, 1984), Petition for recon. pending.

[4] Section 61.12 (f) is the same as former § 61.12 (e) in the NPRM. This rule was relettered because the definition for dominant carrier was inserted. See discussion in Section 61.12 (c).

"connecting carrier" and "other participating carrier." The BOCs[5] comment that these categories may no longer be distinguishable in light of AT&T's divestiture of the BOCs pursuant to the Modification of Final Judgment.[6] The BOCs contended that after divestiture carriers who were considered to be "connecting carriers" will now either be "issuing carriers" or "connecting carriers". The BOCs also argue that the term "through service" used in the definition of "other participating carrier" is no longer applicable "in the end-on-end environment created by access charges."

4. We disagree with the BOCs. These definitions are unaffected by AT&T's divestiture of the operating companies and serve as necessary administrative categories to determine carrier participation and responsibility for the offering of a given service. Divestiture only affected the BOCs and other carriers continue to enter into service arrangements defined by these terms. Accordingly, we shall adopt these definitions as proposed in the NPRM.

5. *Section 61.12 (c): Definition of dominant carrier.* In the NPRM, we proposed the deletion of the "dominant carrier" definition in Section 61.15a (a) because we determined that it was unnecessary in light of the "non-dominant carrier" definition in proposed Section 61.12(e).[7] Commenting parties suggested that this definition be retained. SNET stated that the omission of this definition might give rise to an erroneous presumption as to how dominant carrier status is attained. In order to reduce confusion concerning this term, we have decided not to eliminate a definition of "dominant carrier."

6. *Section 61.12 (e): Non-Dominant Carrier.* The proposed definition of "non-dominant carrier" replaces existing Section 61.15a (b) and reflects the language used in the Competitive Carrier Rulemaking[8] for a "domi-

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[5] The comments in this proceeding were filed prior to AT&T's divestiture of its operating companies on January 1, 1984. The current seven regional holding companies filed one set of comments under the name "Bell Operating Companies" and will be referred to as the "BOCs" in this Report and Order.

[6] United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C.1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). (Modification of Final Judgment or MFJ).

[7] The "non-dominant carrier" definition was Section 61.12 (d) in the NPRM and is now Section 61.12 (e) because we added the "dominant carrier" definition to this section.

[8] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Second Report and Order, 91 FCC 2d 59 (1982), *recon.*, FCC No. 83-69, released March 21, 1983, Second Further Notice of Proposed Rulemaking, FCC No. 82-187, released April 21, 1982, Third Further Notice of Proposed Rulemaking, Mimeo No. 33547, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983), Third Report and Order, Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 (October

nant carrier."[9] A "non-dominant carrier" is "one found by the Commission not to have market power (*i.e.* power to control price)". The BOCs proposed the following definition of a "non-dominant carrier": "a carrier found by the Commission not to have market power over a service (*i.e.* power to control prices of a particular service)."

7. In the Fourth Report and Order in the Competitive Carrier Rulemaking, the Commission found that a firm's market power was indicated by the level and change in its share of a relevant market and that ". . . all interstate, domestic, interexchange telecommunications services comprise a single relevant product market with no relevant submarket."[10] The proposed definition could amount to a substantive change in the Commission's treatment of certain carriers under the Competitive Carrier proceeding. In order to avoid confusion in this Part 61 rulemaking, we have decided to retain the existing definition that was determined in the First Report and Order of the Competitive Carrier Rulemaking.[11] See Appendix A.

8. *Proposed Section 61.18:* "Minor tariff filing." AT&T proposed that a new category of "minor tariff filings" be added to the rules. This category was defined as: "a filing proposing a rate change which (1) results in an annual revenue change of less than $5,000,000 and (2) less than a 10% change in any existing rate structure." AT&T argued that the addition of this category would increase its ability to compete without compromising the Commission's review functions and the Commission could apply full regulatory treatment when necessary through investigations, requests for additional information and the complaint procedures under Sections 206-208 of the Communications Act, 47 U.S.C. §§ 206-08. Several parties urged the Commission to reject AT&T's proposed section as imprecise. They also stated that creation of such a category goes beyond the scope of this proceeding and would be more properly dealt with in the Competitive Carrier Rulemaking or in the Commission's proceeding on Long-Run Regulation of AT&T.[12]

9. "Minor tariff filings" might well be major in terms of their impact on particular customer groups or on relatively small services. Possible reforms of this type are under consideration in the Long-Run Regulation proceeding. For these reasons, AT&T's proposed section on "minor tariff

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15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fourth Further Notice of Proposed Rulemaking, FCC No. 84-82, released March 22, 1984, 49 Fed. Reg. 11,856, March 28, 1984. (Competitive Carrier Rulemaking).

[9] *Id.*

[10] Fourth Report and Order at paras. 5 and 14.

[11] First Report and Order at 51-52.

[12] Long-Run Regulation of AT&T's Domestic Services, CC Docket 83-1147. Notice of Inquiry, FCC 83-482, released October 27, 1983, 48 Fed. Reg. 51340, November 8, 1983. (Long-Run Regulation)

filings" will not be adopted.[13]

10. *Section 61.22: Supplement.* As a result of comments we received pertaining to the scope of Section 61.56, we have redefined "supplement" to be consistent with the language in Section 61.56.[14] Section 61.56 only allows a supplement to be filed for a suspension or cancellation of a tariff publication. The Section 61.22 definition to be adopted as a final rule shall be: "a publication filed as part of a tariff for the purpose of suspending or cancelling that tariff or tariff publication, and numbered independently from the tariff page series."

11. *Section 61.33 (b): Letters of Transmittal.* In the NPRM, we simplified the language of this rule and directed carriers to furnish a reference to any facility authorizations necessary to implement the proposed tariff. FTCC sought either to delete this facility authorization list requirement or to allow a carrier to state generally that it is authorized to serve the point or points included in the tariff or that it has such an authorization pending.

12. We agree that the listing of facility authorizations could be burdensome to carriers. Accordingly, we shall delete the reference to facility authorizations from this section. See Appendix A for the final rule.

13. *Section 61.33 (c): Letters of Transmittal.* In the NPRM we set forth the information that must be routinely submitted with tariff transmittals and specified the exact letter format required. FTCC commented that the actual letter transmittal form did not need to be included in the rules and should be replaced by a list of requirements.

14. The Commission has had difficulty in obtaining the proper information necessary for tariff review. By following the form provided in the rules, carriers will save the Commission staff time, reduce the need for Commission requests for further information and reduce tariff processing delays. This requirement will impose no significant additional burden on the carriers. The letter of transmittal format in Section 61.33 (c) will appear in Part 61 as proposed.

15. *Section 61.38 (a): Supporting Information to be submitted with letters of transmittal - Scope.* The major proposed revision to this rule was the expansion of the exemption to carriers with annual revenues of less than $500,000. This rule presently exempts carriers with annual revenues of less than $200,000. Most of the commenting parties approved of an increase in the exemption amount. They disagreed, however, as to

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[13] AT&T also suggested several rule changes that incorporated references to the proposed Section 61.18 on "minor tariff filings." For the reasons cited in the text, AT&T's proposed changes to Sections 61.38 (a) and 61.58 (c) and the additions of Sections 1.773 (a) (iii) and 61.58 (c) (1) (iv) will not be adopted.

[14] For further clarification of this matter, see discussion in Section 61.56 at paras. 42 and 43, *infra.*

the level to which it should be raised. MCI, COMSAT, and ICA supported the proposed exemption increase to $500,000 but MCI and ICA agreed that this exemption should not apply to access charge tariffs. In reply comments, MCI supported a $1,000,000 exemption but emphasized that revenues of affiliated companies must be aggregated before an exemption is applied.

16. The BOCs suggested that the exemption be in the range of $2,000,000 to $2,500,000 while U S West[15] and NTCA[16] recommended a $2,500,000 exemption. U S West additionally suggested that the Commission should forbear from regulation when a carrier has in place state tariffs covering the same type of service and at the same rates. USTA commented that a $5,000,000 exemption would be appropriate but questioned the use of revenue as a determination for this exemption. USTA suggested that some other measure such as number of access lines be used. Finally, FTCC suggested that an additional clause be added to Section 61.38 exempting "de minimis rate changes" from its coverage.[17]

17. We have carefully considered the above arguments but are not persuaded that the exemption should be increased over the proposed amount of $500,000. Several commenters provided statistics to substantiate an increase to the proposed $500,000 exemption.[18] These figures, however, were in conflict with each other and did not provide any hard evidence as to which specific carriers or categories of carriers now required to file tariffs with the Commission would be exempted at annual gross revenue levels that exceed $500,000. While our proposal will substantially reduce the burden of compliance for small carriers, we cannot justify increasing the exemption over the proposed $500,000 without more specific information as to what types of carriers will be exempted and whether the cost of compliance outweighs the public benefit.

18. In light of the new and untested environment after divestiture, we shall not apply this exemption to exchange access tariff filings. The importance to the Commission of obtaining as much information as

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[15] U S West (Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company and Northwestern Bell Telephone Company) concurred and joined in the BOCs' comments but also filed supplemental comments to propose additional changes to the rules.

[16] NTCA also recommended that the Commission consider creating a simplified cost justification form for the remaining nonexempt "small companies." NTCA had no specific recommendations for this form and did not define "small companies." The proposal will not be adopted.

[17] This suggestion was very similar to AT&T's proposal on "minor tariff filings." FTCC's proposal for exemption of "de minimis rate changes" will not be adopted.

[18] These statistics included figures from the 1982 REA Statistical Report Rural Telephone Borrowers and the USITA Annual Statistics Volume II.

possible to determine accurate access charges outweighs the burden on the carriers in this instance. Although this rule contains no specific exception as to exchange access tariff filings, the Commission invokes its right to require a carrier to submit such information as may be necessary for review of a tariff filing pursuant to § 61.38 (a.)

19. We will not change the exemption criterion from annual gross revenue to some other measure for the exemption as USTA proposed. Annual gross revenue is a standard measure that can be easily determined. No substantive reasons have been presented to illustrate any inadequacy of the current measure. Nor shall we adopt U S West's suggestion that we exempt tariffs that duplicate state filings. Non-exempt carriers can apply for waivers of these cost support requirements when good cause exists.

20. *Section 61.38 (b): Explanation and data supporting either changes or new tariff offerings.* The NPRM proposed no change in the first paragraph of this rule. This paragraph outlines the materials to be submitted for "a tariff change which affects rates or changes or for a tariff offering a new service." These materials include an "explanation of the changed or new matter, reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter." FTCC commented that the phrase "basis of ratemaking employed" used in this provision is vague and should be more specifically defined.

21. The phrase "basis of ratemaking employed" simply requires the carrier to explain the process it used to derive the rates set forth in the tariff. It is impossible to list in the rules all the factors that could be considered by carriers when formulating a rate. For this reason, the phrase "basis of ratemaking employed" will not be more specifically defined.

22. *Section 61.38 (b) (2) (ii): Explanation and data supporting new tariff offerings.* We did not propose to revise this provision in the NPRM. It requires a carrier submitting a tariff filing for a new service offering to provide "estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues." SNET questions the meaning of the term "other service classifications" as it is used in this provision and how it relates to information required about a carrier's unregulated activities.

23. Part 61 only prescribes rules for a carrier's regulated activities. A carrier's "other service classifications" are those services that are regulated under the Communications Act that may be affected by the proposed rate change. We need information as to effects of tariff filings on these "other service classifications" in order to check for cross-

subsidies or any cross-elastic effects. For example, a reduction in an MTS rate may reduce the demand for WATS or private line service.

24. *Section 61.38 (c) (1): Working papers and statistical data.* This provision requires the filing carrier to supply the Tariff Review Branch with "two sets of working papers containing the information underlying the data supplied in response to paragraph (b) of this section". Although the language in this proposed rule was streamlined, the substance of this section remains the same as the existing rule. FTCC commented that the above statement is unclear as to the quantity and type of information required. It also suggested that the Commission consider requiring this information only upon special request of the Commission staff.

25. This proposed rule does not delineate specific working paper requirements for carriers. It was intended that this rule be a flexible one in order to accommodate differing amounts of information necessary to support different tariff filings and to avoid disproportionate burdens of compliance on the carriers. Each carrier, therefore, must present the amount of supporting data necessary for compliance according to the individual circumstances of the carrier and tariff filing question. The proposed rule will not be modified.

26. *Section 61.52 (a): Form, size, type, legibility, etc.* This proposed rule requires, *inter alia*, that tariffs be printed on white paper with margins of not less than one inch. AT&T supported the existing standard requirement of 5/8 inch margins, explaining that one inch margins would increase the volume of all filings and therefore, the cost of filing tariffs. AT&T stated that its tariffs currently on file with the Commission have 5/8 inch margins and that it did not want to reproduce all these existing tariffs with one inch margins. Western Union replied that tariffs with margins of less than one inch were very difficult to read when placed in binders and, therefore, the one inch margin standard should be adopted as proposed.

27. We shall adopt the provision as proposed. The 5/8 margin requirement was originally imposed when tariffs were published in pamphlet form. Now that tariffs are no longer published in this form, but instead published in looseleaf form and placed in binders, one inch margins are required to facilitate their reading. Because this rulemaking is prospective, tariffs now on file need not be reproduced with the larger margin. Any new tariffs filed or new pages to be inserted in existing tariffs, however, must have one inch margins. We expect that no hardship or confusion will ensue from the compliance with this rule. A carrier can apply for a waiver of this rule if such difficulties arise.

28. Another proposed revision of Section 61.52 (a) requires all tariffs to be printed on white paper. MCI requested that the color of tariff pages

not be specified in the rules, arguing that paper color does not affect its legibility.

29. Our experience indicates that use of paper colors other than white can decrease legibility and reproduction quality. Therefore, we shall adopt this provision as proposed. Once again, we emphasize that this rule is prospective in nature. Any new tariffs or new pages to be inserted in existing tariffs must be printed on white paper.

30. *Sections 61.52 (b) (1) and (2) and 61.54 (b) (4): Form, size, type, legibility, etc. and Composition of Tariffs.* These proposed sections, *inter alia*, designate where an issuing officer's name should appear in a tariff. SNET and the BOCs recommended that only the issuing officer's title be required, arguing that issuing officers may change while a tariff is effective.

31. We require the issuing officer be identified in the tariff so that, if necessary, the public can contact that officer. We have determined that this requirement will be satisfied by providing the issuing officer's title. A carrier must update its tariff if the issuing officer's title changes. A carrier, if it prefers, may include the issuing officer's name to provide the public more specific information. Accordingly, these sections shall be adopted with the above modification. See Appendix A.

32. *Section 61.54 (b) (5): Composition of tariffs-Revised title page.* This provision requires a carrier to make a notation of the original tariff effective date when a revised title page is issued. The NPRM did not propose to modify this provision except for a one word change stating that a carrier "must," rather than "shall" make the notation. FTCC questioned the need to require that the original effective date of a tariff be noted on the revised title page.

33. When tracing the history of a tariff rate or regulation revision, the original effective date on the revised title page is very useful for research purposes. This notation reduces time and confusion for the tariff user and the Commission staff. For this reason, we shall not eliminate this requirement.

34. *Section 61.54 (c) (3): Composition of tariffs.* This provision pertains to the revision of the tariff check sheet when tariff pages are revised or added, or when supplements are issued. We proposed to revise this provision to include the following statement on the revised check sheet. "*Page issued _____ (date)." AT&T commented that it is redundant to specify the date after the asterisk because the check sheet issue date would be the same. To eliminate this redundancy but still retain the indication of a change, AT&T recommended that the words "New or revised page" follow the asterisk.

35. We agree that the repetition of the date in the asterisked statement on the revised check sheet is unnecessary. Using the statement

"New or revised page" is consistent with our intent to notify the public that specific pages have been revised or added at the time of issuance. Therefore, we shall adopt the modification that AT&T proposed and the final rule will contain the asterisked statement "New or revised page". See Appendix A.

36. *Section 61.54 (h): List of other participating carriers.* In the NPRM, we proposed to clarify the existing requirement of providing a list of other participating carriers with a tariff. The proposed language is: "This list must contain the exact name of every other carrier subject to the Act engaging or participating in the communication service to which the tariff or supplement applies, together with the name of the city or town in which the principal office of such carrier is located." The BOCs indicated that the requirement of listing other participating carriers is burdensome because these carriers are difficult to identify and constant updating of this list would be necessary.

37. The commenting parties may be misinterpreting the term "other participating carrier." By definition,[19] an "other participating carrier" is one that is subject to the Communications Act and provides through service in conjunction with another carrier subject to the Act. A carrier should have written agreements with "other participating carriers" to guarantee through service and should easily be able to list these carriers in order to comply with this long-standing requirement.[20] We will adopt this modified rule as proposed in the NPRM for the foregoing reasons.

38. *Section 61.54 (i) (3): Composition of tariff.* This proposed rule requires that "items which have not been in effect 30 days when brought forward on revised pages must be shown as reissued . . .." Both FTCC and Western Union sought clarification of this proposed rule. FTCC suggested that the rule be deleted.

39. This provision clearly requires that a tariff item must be designated as reissued when that item has not been in effect for thirty days and a subsequent change is made to other items on that page. The object of this rule is to eliminate confusion as to what items on a page are actually in effect. Assume, for example, that a tariff is filed on May 1, 1984 with a ninety day notice period, thus becoming effective on July 30, 1984 if no suspension is ordered. A subsequent tariff filing takes place on July 1, 1984 and includes revisions of several pages that were issued in the May 1, 1984 filing. Items changed in the May 1 filing but unchanged on these

[19] See § 61.12 (f) - "other participating carrier" definition in Appendix A.

[20] Presently, "connecting carriers" are listed in a separate tariff and carriers have been allowed by Commission order to waive Section 61.74 reference requirements. The "connecting carrier" can reference this separate tariff in its other tariffs. If the list of "other participating carriers" becomes unduly long, carriers could apply for a waiver of Section 61.74.

subsequent tariff filing pages will not have to be shown as reissued unless these pages are to become effective less than thirty days after the initial filing becomes effective. Thus, if the July 1, 1984 filing becomes effective prior to August 30, 1984, the items originally filed May 1 will have to be shown as reissued. If the July 1, 1984 filing becomes effective after August 30, 1984, the items originally filed May 1, 1984 must not be shown as reissued.[21] We shall adopt this provision as proposed in the NPRM.

40. *Section 61.54 (j): Rates and general rules, regulations, exceptions and conditions.* This section combines and simplifies the language of two existing rules. The substance of this proposed section is unchanged from the existing rules. A provision of this proposed rule prohibits a tariff from containing a "rate, rule, regulation, exception or condition," which "in any way attempts to substitute a rate, rule, regulation, exception, or condition named in any other tariff." FTCC commented that this provision is inconsistent with current international record carrier practice. According to FTCC, international record carriers are required by Commission order[22] to reference the tariffs of other common carriers for interconnected international and domestic telex calls, and to collect on the basis of rates specified in such tariffs. FTCC requested that these facts be reflected appropriately in the rules.

41. We are aware that where it is necessary in order to implement Commission policy, carriers will occasionally be ordered to take an action that differs from the procedures established in the rules. For practical purposes, however, the Commission's rules cannot be segmented to meet highly specific individual carrier needs. Rather, the rules must apply generally to all carriers. Therefore, we will adopt this revision of § 61.54 (j) as proposed. Carriers may request waivers of this rule supported by a showing of good cause when special circumstances arise.

42. *Section 61.56: Supplements.* This section was proposed to allow a supplement to be filed only when a tariff is suspended or cancelled. We combined and revised existing Sections 61.56 and 61.116 to create this proposed section.[23] Both FTCC and the BOCs requested that this proposed section be expanded to allow supplements to a "part" of a tariff. COMSAT proposed that Section 61.116 be retained to allow the filing of supplements that are specially authorized by the Commission. Western Union agreed with the BOCs.

43. We have intentionally limited the use of supplements, since a supplement is generally filed at the back of a tariff and therefore, can be easily missed by a party reviewing the tariff. The tariff user could also be mislead by tariff page information that is subsequently changed by a

[21] See also discussion of Section 61.59, *infra*, paras. 64 and 65.

[22] FTCC gave no specific cites to Commission orders requiring such references.

[23] As a result of this revision, the NPRM proposed the deletion of Section 61.116.

supplement filed at the back of the tariff. Important tariff changes such as rates or effective dates must be shown on revised tariff pages so that this information is easily accessible to tariff users. In the case of cancellation or suspension of a tariff, however, short time intervals require that supplements be allowed. In order to further clarify this requirement, we have revised the definition of supplement[24] and added the word "publication" to Section 61.56. This latter addition will reflect the carrier's ability to supplement documents other than the tariff itself.[25] The section will be adopted with this modification. Special waivers can be requested under Section 61.152 when the situation warrants.

44. *Section 61.58 (a) (4): Notice requirements-customer notification.* This proposed section requires a carrier to inform affected customers when it issues a tariff publication that would increase any rate or charge, or that would discontinue, reduce or otherwise impair service to those customers. The proposed rule also includes examples of appropriate methods of notification. In our NPRM, we proposed that non-dominant carriers be exempted from the customer notification requirements under § 61.58 and that dominant carriers be exempted from these customer notification requirements for rate revisions that involve only an "insubstantial" increase over a twelve month period. We did not propose a precise rule revision because we lacked sufficient information and desired public comment before formulating a new rule. Most commenters favored elimination of customer notification requirements for non-dominant carriers but many disagreed with reducing notification requirements for dominant carriers. Other parties attempted to define an "insubstantial" rate increase but could reach no consensus.

45. Commenting parties supporting exemption of non-dominant carriers from customer notification requirements agreed with the Commission views set forth in the NPRM. We stated in the NPRM that under the constraints of the marketplace, non-dominant carriers will voluntarily provide satisfactory notice to their customers in order to remain competitive. The commenting parties agreed that this reliance on the marketplace was a reasonable and less burdensome alternative to the Section 61.58 requirements of customer notification for non-dominant carriers. Parties opposing the proposed rule argued that customers need actual prior notification of rate changes and service discontinuances to enable them to review tariffs for discrimination and unjustness and to file petitions for suspension or rejection if necessary. Moreover, they claimed, customers need actual prior notice in order to consider alternative carriers and to adjust any affected contracts. HBO specifically requested the exclusion of domestic satellite carriers (domsats) and miscellaneous common carriers

[24] See Section 61.22 at para. 10.

[25] See Section 61.24 in Appendix A for definition of tariff publication.

(MCCs) from this exemption because these carriers have few customers and limited competitive alternatives are available to these customers.

46. Through the Competitive Carrier Rulemaking, we determined that non-dominant carrier tariffs are presumed lawful and that because of their lack of market power, non-dominant carriers are constrained by the availability of competitive alternatives to provide service to their customers at just and reasonable rates and on reasonable terms and conditions. As noted in the NPRM, less than a dozen petitions asserting the unlawfulness of non-dominant carriers' filings have been filed per year since the adoption of the First Report and Order in the Competitive Carrier Rulemaking. After review, all of these petitions were found to lack merit. The purpose of the notification requirement was to assure that customers would be aware of any rate increase in case they wished to file a petition. The rule was not developed to facilitate customer changes in service. As with any other competitive industry, customers will be adequately notified of rate changes as the marketplace demands. Under the proposed rule, non-dominant carriers will be under no obligation to give customers actual prior notice of rate increases and service discontinuances, and customers can use the complaint process under Section 208 of the Communications Act, 47 U.S.C. § 208, to protest unjust and discriminatory rates. In accordance with our views in the NPRM and with concurrence from several commenting parties, we have revised Section 61.58 (a) (4) to exempt non-dominant carriers from customer notification requirements.[26] (See Appendix A.)

47. The other proposed exemption from customer notification requirements would eliminate dominant carrier filings which involve an "insubstantial" rate increase. Generally, the parties agreed that the exemption should be set low enough so as not to adversely affect the public, but they did not agree on a specific definition of an "insubstantial" rate increase. The BOCs considered an "insubstantial" rate increase to be one that: (1) equals less than the cost of notification; (2) is less than $1,000,000 per state; (3) is less than a 2% increase per customer per year; and (4) affects fewer than 1% of the carrier's customers. AT&T referred to its "minor tariff filing" proposal and indicated the same criterion be used to determine an "insubstantial" rate increase.[27] Western Union proposed that dominant carriers notify customers of rate increases that exceed 10% for any rate or rate element either alone or in combination for a twelve month period, or any that involve access charges, new service or a discontinuance, reduction or other impairment of service to any customer.

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[26] This exemption will include all non-dominant carriers. Domestic satellite carrier and miscellaneous common carriers are subject to the same competitive constraints as other non-dominant carriers pursuant to the Competitive Carrier proceeding.

[27] See paras. 8 and 9 *supra.*

GTE suggested that anything less than a 5% increase or decrease of a rate could be considered insubstantial and also suggested that an overall revenue limit be set per service category.

48. The Networks, TCA, ADAPSO, ICA and ARINC essentially agreed that dominant carriers should not be exempted from the customer notification requirements, arguing that "insubstantial" rate increases are difficult to define and that the cumulative effect of "insubstantial" rate increases could equal a very substantial increase. These carriers also argued that dominant carriers would be able to change a term or condition without customer notification and thereby increase charges for certain customers without an actual rate change.

49. Since there is no general agreement as to the definition of "insubstantial" rate increases not requiring notification of customers, we shall continue to study this issue. The issues raised by opponents of this proposal, specifically, the cumulative effect of "insubstantial" rate increases and the possibility of "hidden" rate changes, must be addressed. We will not for the present, therefore, revise this section to reduce customer notification requirements for dominant carriers.

50. *Section 61.58 (c): Notice requirements-other carriers.* In this section, the NPRM proposed a substantial reduction in the length of the notice period which a carrier must afford the Commission and the public before new tariff proposals can go into effect. The NPRM proposed to reduce current notice periods of seventy and ninety days to thirty-five and forty-five days respectively.[28] We proposed this change to permit carriers to respond quickly to competitive offerings, new technologies and new circumstances. We balanced this policy, however, against the need to preserve our ability to perform our oversight responsibility under the Communications Act. It has been our experience that most tariffs can be reviewed by the Commission and the public in this proposed amount of time. For controversial or complex tariffs, the Commission can require the full ninety day notice period if necessary. See § 61.58 (a) (2).

51. All of the commenting parties agreed that the reduction of the seventy day notice period to thirty-five days presented no difficulties. There was disagreement, however, as to the proposed reduction in the ninety day notice period. The commenters in favor of the ninety day notice reduction generally echoed the positive effects of this proposed change

[28] The associated pleading cycles for petitions and replies addressing these filings are contained in Section 1.773 (a) (2) (ii). No revisions to this section were proposed in the NPRM. This section prescribes a twenty-five day pleading deadline for a ninety day filing and a fifteen day pleading deadline for a filing made on at least thirty days but less than ninety days notice. Pursuant to this section, therefore, when the ninety day notice period is reduced to forty-five days, the pleading cycle is reduced to fifteen days. The change in the seventy day notice period to thirty-five days does not affect the associated pleading cycle which remains fifteen days.

cited by the Commission in the NPRM. They asserted that this proposal struck a balance between the public interest and competitive necessity and that, if adopted, this notice reduction would allow dominant carriers to compete effectively with carriers subject to reduced regulation as a result of the Competitive Carrier proceeding.[29]

52. Several parties suggested additional modifications to this notice reduction proposal. U S West endorsed a reduction of notice periods to thirty days to coincide with state commission notice periods. FTCC suggested carriers should maintain tariff mailing lists of interested parties that would receive direct copies of every filing. Western Union proposed that a ninety day notice period be retained for "significant filings," which it precisely defined in the context of its customer notification requirements proposal.[30] GTE agreed with the reduction in notice periods for all dominant carriers except AT&T, arguing that the issue of whether AT&T should be allowed shorter notice periods does not belong in this proceeding but rather in the Long-Run Regulation proceeding. GTE also proposed that dominant carriers other than AT&T be required to issue a Public Notice, giving a complete and fair summary of their tariff filings and that interested parties would be allowed fifteen days to comment on these proposed summaries. GTE stated that this modification would allow interested parties to monitor current tariff filings and to take timely action. These proposed modifications were not generally accepted by the other commenting parties.

53. The parties opposing reduction of the ninety day notice period were mainly concerned about the associated reduction in the pleading cycle to fifteen days pursuant to Section 1.773 (a) (2) (ii).[31] Their main argument was that a reduction in the pleading cycle would preclude the public from conducting meaningful tariff review and, therefore, enable unlawful tariffs to go into effect. Other arguments were directed specifically against AT&T. Commenters asserted that AT&T should still be considered to possess market power after divestiture and should not be given an even greater competitive advantage. Furthermore, they said, any decision to reduce notice periods for AT&T was premature and should be addressed in the Long-Run Regulation proceeding. Parties also cited AT&T's generally poor record of having many of its tariffs rejected and stated that the full notice period was definitely needed to review AT&T's filings. According to TELTEC, a notice period reduction for AT&T would put resellers at a distinct disadvantage because they would have inade-

[29] See note 8 *supra*. Non-dominant carriers are permitted to file tariffs on fourteen days' notice and carriers subject to forbearance are not required to file tariffs. See also Section 61.58 (b).

[30] See para. 47 *supra*.

[31] See note 28 *supra*.

quate time to adjust their contracts for compensatory pricing, if any AT&T rate increase should go into effect. SBS also proposed that if notice periods were shortened for AT&T, a mechanism for instant publication of its tariff filings should be put in place so the public could immediately file petitions requesting application of the full notice period.

54. We continue to believe, as stated in our NPRM, that a reduction in the ninety day notice period will benefit the public without compromising the Commission's responsibility to review tariff filings completely, and without precluding meaningful public analysis. For most filings, shortened notice periods will benefit the public allowing new services to go into effect more quickly. This proposed reduction of notice periods is purely a procedural change and is properly included in this proceeding.[32] The Commission will continue to monitor dominant carrier tariff filings closely and review all associated pleadings filed in accordance with § 1.773 (a) (2) (ii). The Commission reserves the right to apply the full notice period for filings requiring additional review time. The Commission's procedures are flexible and on our own motion or on request from any interested person, we will consider extending the time for public comment.[33] Our procedures will be altered as necessary in order to allow for complex tariff filings. We understand that under certain circumstances parties may have a difficult time in adhering to the pleading cycle and the Commission will provide adequate review time on its own motion or when reasonable requests are made. Indeed, we could even request additional rounds of comments on specific issues. In light of this procedural flexibility and the public benefits, we shall adopt Section 61.58 (c) as proposed.

55. With regard to the commenting parties' recommendations for further revisions to § 61.58 (c), we have determined that none of these proposals should be adopted. The thirty day notice period suggested by U S West might be inadequate to review dominant carrier tariffs, and state tariff requirements have no bearing on the Commission's review obligations. The proposals to require immediate notification of tariff filings or direct mailing lists certainly point out valid concerns for the effective and

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[32] The Long-Run Regulation proceeding addressed several aspects of our regulation of AT&T. Some of these are related to the substantive issue of AT&T's market power, which we do not address by our action today. Other specific procedural aspects of our regulation, including the proposed shortening of tariff notice periods, were addressed by some commenters in the Long-Run Regulation proceeding. Commenters in favor of shortened notice periods were Vermont Department of Public Service and Vermont Public Service Board, Michigan Public Service Commission, Cargill, Inc., and Office of the Consumer's Counsel of Ohio. Parties commenting against shortened notice periods were the Federal Executive Agencies and the Association of American Railroads.

[33] The Commission has for some time now routinely granted special permission under § 61.58 to permit filings on forty-five days notice without regard to their controversial nature. Where necessary, our ability to defer the filing to the full ninety days has proven effective to balance competing interests.

timely flow of information. Based upon our experience, we do not anticipate problems in this area. The Commission, therefore, does not believe it is reasonable to impose additional requirements and expenses on the carriers for tariff filing notifications. The Commission has designed its tariff processing procedures to insure the timely availability of tariff information to the public. The Commission prepares a daily log of all tariff filings that is available in the Tariff Reference Room located on the fifth floor of the main Commission building. Parties interested in monitoring tariffs can avail themselves of this information during normal office hours.

56. *Section 61.58 (c) (1) (ii): Other carriers.* This proposed rule was a consolidation of three existing rules. It states, *inter alia,* that tariff filings involving new rates and regulations not previously filed at, from, to or via points on new lines must be made on or at least fifteen days' notice. FTCC sought clarification of the term "new lines" although this term was contained in the existing rules. FTCC questioned whether the following situations would be considered "new lines:" (1) provision of a new service on a previously used circuit; (2) an old service on a new circuit; and (3) provision of direct service that replaces service via transit points.

57. The focus of this rule should be on two things: "new rates and regulations" in combination with "new lines," "new radio facilities" and "new points of radio communications." A carrier files a tariff on fifteen day notice when it wishes to establish a new rate or regulation for these points. It appears that FTCC is interpreting this proposed rule in terms of the physical routing of circuits necessary to provide a service. Physical routing of circuits may change but the same rates and regulations may remain in effect. When circuit rerouting causes rates and regulations to change, then a tariff should be filed pursuant to this rule. We shall adopt this provision as proposed in the NPRM.

58. *Section 61.58 (c) (1) (iii): Other carriers.* AT&T proposed to add a provision to this section that would allow fifteen days' notice for "special arrangements furnished to the United States Government which supplement or modify existing services." AT&T's rationale was that a notice period longer than fifteen days was unnecessary for a service offering that affected only one party. ADAPSO replied that changes to a government service were clearly more important and complicated than other changes contained in this section and required a longer notice period.[34] ADAPSO also commented that the corresponding seven day

[34] This proposed section now requires that fifteen day notice periods be applied, *inter alia,* to a change in the name of a carrier, a change in the vertical and horizontal coordinates and a change in the lists of mileages.

pleading cycle was inadequate for public review.[35]

59. There has been no persuasive rationale offered that would warrant the reduction of notice periods for Government-related tariffs. The Commission and the public need an adequate period to review these tariffs pursuant to proposed Section 61.58 (c). AT&T's proposed addition to Section 61.58 (c) (1) (iii) will not be adopted.

60. *Proposed Section 61.58 (d).* Western Union proposed the addition of a section stating that "Tariff filings made involving decreases in charges for a period of three months or less may be made on one day's notice." Western Union claimed that the addition of this provision would encourage carrier creativity and increase competition by allowing a carrier to put a promotional discount immediately into effect. This one day notice period; it maintained would eliminate tariff imitation. Western Union observed that under the existing rules, carriers can match the original carrier's discount before that carrier's rate becomes effective and, in effect, deprive the original carrier of its market advantage. AT&T agreed with Western Union, while MCI and RCA objected to this proposal because it relaxed tariff regulations for dominant carriers.

61. Western Union's proposal on one day notice periods for short-term rate reductions could result in the introduction of rate changes having significant impact on customers and competitors without any prior review by the Commission. Therefore, we shall not adopt Western Union's amendment. Carriers may use the special permission procedures to request a reduced notice period for a temporary promotional tariff. In addition, we are aware that varying notice periods allow non-dominant carriers to put promotional tariffs into effect more rapidly than dominant carriers. (See Sections 61.58 (b) and (c).) Reduced notice periods adopted in this rulemaking should mitigate this situation. Dominant carriers, too, may receive permission to implement promotional tariff changes on a timetable comparable to that afforded non-dominant carriers. The Commission has and will continue to handle special permission applications expeditiously to benefit the public with lawful promotional discounts.[36]

62. *Proposed Section 61.58 (e): Notice Requirements.* The NPRM proposed to delete Section 61.58 (d) which provided that a carrier may apply for special permission pursuant to § 61.152 to request a reduced notice period if no petitions seeking suspension or rejection of that tariff

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[35] Section 1.773 (a) (2) (i) allows a seven day pleading cycle for a tariff notice period of less than thirty days.

[36] Special permission applications may be submitted either to waive the prescribed notice period before filing the rate decrease or to advance the effective date of a rate decrease. The special permission process has been running smoothly and most applications have been acted upon within twenty-four hours of receipt. An example of such a special permission being granted is Special Permission No. 84-187 which allowed AT&T to offer a promotional discount for a limited duration in the Charleston, West Virginia area.

are filed within the filing periods established in § 1.773 (a) (2). AT&T proposed to retain that section with modifications that would allow carriers to refile unopposed tariff sections to become effective on five days' notice. (Due to the reorganization of the rules it would be called Section 61.58 (e).) ADAPSO objected to this proposal stating that the shortened review period could be potentially harmful to the public interest.

63. The NPRM proposed to delete this section as unnecessary in light of the shortened notice periods in proposed § 61.58 (c) and the overall special permission provision in § 61.152. In addition, AT&T's proposal does not consider that the Commission itself may have objections to a tariff even if no petitions are filed against it and may, therefore, require the full notice period to review it. For these reasons, AT&T's proposed Section 61.58 (e) will not be adopted and Section 61.58 (d) will be deleted as proposed in the NPRM. Carriers may still apply for special permission to advance the effective date of a tariff.

64. *Section 61.59: Effective period required before changes.* This proposed rule restates existing § 61.59 (a) and adds an exception for corrections authorized by the Commission. This section requires a carrier to wait thirty days before changing any newly established rate or regulation. AT&T, FTCC and the BOCs proposed the deletion of this section so that changes could be made to a new rate or regulation at any time. Several commenters opposed this deletion, arguing that multiple filings by a dominant carrier in a short period of time would be burdensome on the Commission and the public and that elimination of this requirement would cause instability and "rate churn."[37]

65. We agree that allowing a carrier to change a rate or regulation within thirty days after it has been established creates confusion for the public and introduces unnecessary complexity in the tariff review process. It has not been shown that this thirty day interval between rate changes has caused a burden to the carriers, especially in the light of the ability to request shorter notice as is done routinely under the existing rules.[38] Accordingly, we shall retain the effective period as set forth in the NPRM.

66. *Section 61.64: Rates and Regulations for Ticker Services.* The NPRM made no substantive change to this existing rule which specifies the rates and regulations for installation of ticker services. Western Union suggested that this provision should be deleted because no future installations of ticker service are planned and no new installations have taken place in the last several years.

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[37] "Rate churn" is the constant changing of rates causing customer confusion and lack of certainty as to the actual rates in effect at any given time period.

[38] See discussion regarding Section 61.54 (i) (3) in paras. 38 and 39.

67. After reviewing Western Union's comments and the status of ticker service in general, we agree that there is no longer a need for a provision regarding rates and regulations for it. Since this rule lacks future applicability, we will delete Section 61.64 from the rules.

68. *Section 61.66: Changes in message telegraph service point listings where basic schedules of rates and regulations are already effective.* This proposed rule was unchanged in the NPRM except for the deletion of "money order services" which is no longer a tariffed offering. This provision specifies notice periods for changes in existing message telegraph service points. Western Union indicated that this provision should be eliminated as a result of the conclusions in the *Regulation of Domestic Public Message Service*, 75 FCC 2d 345 (1980). Western Union maintained that this decision released it from the requirement of seeking Commission approval before adding, deleting or changing the hours of offices and agencies.

69. We agree with Western Union's interpretation of the Commission's decision and conclude that notice need not be given for changes in message telegraph service point listings where basic rates and regulations are already effective. We shall, therefore, delete Section 61.66 from the rules.

70. *Section 61.67: New or Discontinued telephone, telegraph, teletypewriter service points; mileage.* This rule, unchanged by the NPRM, states when additions or discontinuances in telephone and teletypewriter service points and when additions in message telegraph service points must be filed with the Commission. Western Union, using the same rationale that it used for changes to Sections 61.64 and 61.66, proposed that this section be modified to delete references to "teletypewriter" and "message telegraph service points."

71. We agree that the term "message telegraph service points" should be deleted. The carrier keeps a list of these service points at its centralized telephone bureaus, and it is unnecessary to maintain this list in the carrier's tariff filing.[39] Western Union is still required, however, to file lists of teletypewriter exchange service points in its tariffs because of their relation to the rate structure, and Western Union is responsible for updating these lists when any additions or discontinuances of these points take place.[40] Section 61.67, therefore, remains applicable to teletypewriter exchange service points. See Appendix A for the revised language of Section 61.67.

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[39] Western Union Tariff No. 263 which contains a list of message telegraph service points will still be required for other important rate information it provides.

[40] Western Union must provide a list of teletypewriter exchange service points in Western Union Tariff F.C.C. No. 258 and a list of telex service points in Western Union Tariff F.C.C. No. 240.

72. *Section 61.68 (a): Special Notation.* This proposed section requires a special notation when all or part of a tariff is filed on less than the notice required in § 61.58. This proposed special notation is: "Issued on not less than ___ days' notice under authority of ____. (specific reference to the special permission, decision, order or section of these rules)." We simplified the language of this section but it remained substantively unchanged. AT&T and Western Union proposed that the requirement that the specific number of days' notice stated be deleted because this number is sometimes difficult to ascertain.

73. We specifically retained this requirement because we consider it important to a tariff reader's understanding of the proceedings associated with the tariff. The number of days is easily calculated by counting the number of days between the issue date and the effective date. The precise method of calculation is delineated in Section 1.4(a) of the Commission's rules, 47 C.F.R. § 1.4 (a).

74. *Section 61.69: Rejection.* This proposed section combined two existing rules concerning the rejection of tariff publications by the Commission.[41] Specifically, this proposed rule requires that a subsequent publication issued in lieu of a tariff rejected by the Commission must bear a notation to that effect. FTCC suggested deletion of this provision because it believes that such a notation on a current tariff leads the public to make inaccurate inferences about the carrier's ability to conduct business efficiently.

75. The proposed requirement is purely administrative and is in no way intended to reflect on a carrier's business image. Since partial rejections and suspensions of tariffs are possible, some rejected tariff material may remain physically in the tariffs. The notation simply informs the public what action has been taken on the carrier's tariff and indicates which tariff material is currently effective so that the appropriate rates and terms can be ascertained. The parties using the tariffs on any regular basis should be familiar with Commission procedures and understand the reason for such a notation. This section will be adopted as proposed in the NPRM.

76. *Section 61.72: Posting.* The existing section was revised to clarify existing posting requirements. These posting requirements can be satisfied by following one of two methods. The first method requires a filing carrier to post the schedule of rates and regulations in the main office while the second method requires these schedules to be posted in each state a carrier operates. In our NPRM, we requested comments on the appropriateness of imposing these posting requirements in the future. Several posting alternatives were suggested in the comments and the commenting parties stressed that carriers should be given maximum

[41] This section consolidates existing Sections 61.69 (a) and 61.117.

flexibility and discretion to determine the best method of posting for its operation. Carriers indicated that the current posting requirements were burdensome because it is costly to reproduce tariffs and maintain them at several locations. In addition, some carriers provided figures to show that these posted tariffs were seldom used by the public and that most interested parties arranged to receive copies of tariffs directly from tariff publishing and distribution contractors.

77. Several recommendations for revised posting procedures were offered by commenting parties. These methods of fulfilling the posting requirement included making tariff information available to customers through written request procedures, telephone call-in services or subscription services. Another suggestion was to limit actual tariff posting to one location per company, per state. Most parties indicated that a variety of methods could be acceptable as long as current posting requirements were reduced. ADAPSO questioned whether the posting requirement could be totally eliminated because Section 203 of the Communications Act of 1934 specifically states that rate schedules should be posted and kept for public inspection in such places designated by the Commission.

78. After careful review of these comments and further consideration of the matter, we have decided to modify the existing rule. Carriers will now be required to post their tariffs in one office per state or territory in which they operate. In addition, each carrier will be required to maintain a telephone number for public inquiry about information contained in the tariffs. By providing a telephone call-in service readily available to interested parties and by posting only one copy of a tariff per state or territory, a carrier should experience a reduced regulatory burden without any loss of tariff information to the public. See Appendix A for this revision.

79. *Section 61.74: References to other instruments.* The NPRM made no changes to this rule which requires a tariff publication to contain no references to other tariffs, documents or instruments except as otherwise provided in Part 61. Several parties commented that this section should be expanded to allow referencing to other tariffs and, in some cases, other documents. These parties cited the access tariffs as an example of referencing allowed by the Commission. According to these commentors, referencing of other tariffs and documents would contribute to administrative efficiency and eliminate applications for waivers pursuant to Section 61.152.

80. A tariff should be complete when filed. Confusion may result if references to other tariffs are allowed since all important information will not be consolidated in one place and references may be incomplete. In addition, referenced documents may not be easily accessible to the public. We will continue to require complete tariffs with no referencing except as

indicated by this rule. Special permission applications will be granted where good cause can be shown. Therefore, we shall not alter Section 61.74.

81. *Section 61.131: Concurrences-Scope.* This provision was entirely restructured in the NPRM. In addition to describing the general scope of the concurrence rules and delineating the two broad categories of concurrences, this rule prohibits the filing of limited or partial concurrences. Carriers filing concurrences must concur in the filing carrier's entire tariff. Several parties proposed that this restriction on limited and partial concurrences be removed. They argued that this restriction is burdensome because it causes a carrier to duplicate existing tariff material of another carrier. Some parties pointed out that waivers to this Section had been granted in certain instances.

82. Our policy of only allowing carriers to concur in the entirety of another tariff must prevail in order to avoid confusing the public. It must be absolutely clear what provisions are being adopted from another carrier's tariff; the most effective way of presenting this material is by duplicating the exact provisions in the issuing carrier's tariff. This duplication eliminates any possibility of failure on the carrier's part to describe adequately the limitation of the concurrence desired. Carriers can apply for special permission waivers of this rule pursuant to Section 61.152 where good cause can be shown. We shall adopt this rule as proposed in the NPRM.

83. *Section 61.136: Revocation of concurrences.* In the NPRM, this rule required not less than ninety days' notice for a revocation of a concurrence. This rule has been changed to reflect the shortened notice period of forty-five days pursuant to the rationale set forth for the Section 61.58 (c) revision.[42] See Appendix A.

84. *Section 61.137: Alaskan carriers and licensees of mobile radio stations.* This proposed rule was renumbered and rewritten to clarify the concurrence procedures for Alaskan carriers and licensees of mobile radio stations. ALASCOM[43] commented that this rule currently has no practical application and was needed only when Alaskan carriers were government-owned and not required to file tariffs with the Commission. ALASCOM requested the deletion of this section and indicated that Alaskan carriers should follow the general concurrence rules contained in Sections 61.131 through 6.136.

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[42] See paras. 50-55 *supra.*

[43] ALASCOM did not file initial comments in this proceeding but did file reply comments regarding § 61.137. ALASCOM requested a waiver to have its reply comments accepted. No parties opposed this request and ALASCOM supported its request with a showing of good cause. For these reasons, we accept ALASCOM's comments.

85. As we noted in the NPRM, we offered the entire recodification of Part 61 for public comment in order to be sure the provisions are consistent and uniformly applied. We agree with ALASCOM that there is no longer any reason for Alaskan carriers and licensees of mobile radio stations to be treated differently with regard to concurrence procedures. Section 61.137 will be deleted from the rules and Alaskan carriers and licensees of mobile radio stations must now adhere to the concurrence rules contained in Sections 61.131 through 61.136.[44]

86. *Section 61.152: Terms of Applications and Grants.* Proposed Section 61.152 consolidated requirements for special permission applications now set out in §§ 61.152 61.153. A special permission application must be made whenever a carrier wishes to be excused from compliance with any Section of Part 61. Carriers must show good cause as to why special permissions should be granted. Western Union commented that it should not be necessary to apply for special permission when a Commission order has directed a carrier to act and proposed that the following sentence be added to this section: "No application for special permission is necessary to perform an action directed by a Commission order". AT&T agreed with Western Union and suggested that the Commission include appropriate authorization for action in its orders.

87. Recent Commission orders have included appropriate authorizations for carriers to act. It is our intention that all orders will carry these authorizations where necessary and that carriers will normally not have to file separate special permission applications when a Commission order directs it to act. We will not, therefore, adopt Western Union's proposed revision because implementation of the above Commission policy makes it unnecessary. We will, however, reduce the burden on carriers with respect to cancellation of an original grant of special permission. Carriers will no longer have to apply to the Commission for cancellation of a special permission grant. If this grant is not used within sixty days of its effective date, it will be automatically cancelled by the Commission. See Appendix A for the new language reflecting this change in Section 61.152.

88. *Section 61.153: Method of filing applications.* This proposed rule consolidates existing format requirements and filing procedures for special permission applications. It also formalizes the practice of attaching illustrative tariff pages to the application. Western Union commented that filing illustrative tariff pages can be burdensome because it may require extensive duplication of pages in a short interval of time. As an alternative, Western Union suggested that a carrier be permitted to describe the proposed changes when that method would be more convenient.

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[44] Sections 61.131 and 61.134 have been revised accordingly to delete references to Section 61.137. See Appendix A.

89. We have decided to formalize the requirement of illustrative tariff pages because it has been our experience that the descriptions of proposed changes often do not match the actual revised tariff pages. In order to make a reasoned conclusion as to whether special permission should be granted, we require the submission of illustrative tariff pages. It has been our practice, however, to accept illustrative pages in rough form, and we shall continue to do so. We will not modify this section according to Western Union's proposal and this section shall be adopted as proposed in the NPRM.

90. *Section 61.171: Adoption Notice.* We substantially altered the procedure for adoption of tariffs by successor carriers in this proposed section. Adoption of tariffs take place when a carrier's name changes or when a merger is conducted or when an acquisition of one carrier by another takes place. The proposed rule gives the successor carrier the option to immediately reissue the entire adopted tariff in its own name or to immediately file an adoption notice. When an adoption notice has been filed, the carrier has fifteen days to reissue the tariff in its own name according to the proposed rule. The BOCs commented and Western Union agreed that fifteen days is insufficient time for the reissuance of a tariff. They suggested that a forty-five day period would be more reasonable.

91. This rule was specifically modified in the NPRM to reduce customer confusion and administrative difficulty for the Commission Staff when an offering carrier's name has changed. The successor carrier has been given two alternative methods for adoption to suit its convenience and it is important that required changes be made as quickly as possible. A successor carrier must reproduce the tariff pages with the new carrier name, the original paging sequence and the new issuing officer's name. We have decided to allow thirty-five days for the successor carrier to make these tariff changes. The final rule shall reflect this change from fifteen days to thirty-five days. See Appendix A.

92. *Sections 61.191, 61.192, 61.193: Suspensions.* The NPRM proposed no substantive changes to these rules but streamlined their language. Sections 61.191 and 61.192 require that a supplement indicating the term of suspension and prior effective tariff publication be issued when a suspension has been ordered. Section 61.193 requires that a supplement be issued when the Commission vacates a suspension order. Western Union proposed the following changes: (1) that a carrier have the option to file revised tariff pages noting the suspension rather than filing a supplement when it would be more convenient for the carrier; (2) that Section 61.192 be deleted so that carriers will not be required to issue a supplement indicating what prior tariff publication is effective during the suspension period; and (3) that Section 61.193 have specific language clearly stating that it only applies to Commission orders vacating tariffs

and does not apply to a suspension order that has expired by operation of law.

93. We have considered Western Union's recommendations and these rules will not be modified for the following reasons. While we require revised tariff pages for permanent changes, we consider revised tariff pages with a caption noting a suspension to be unnecessarily repetitive and time consuming. A supplement filed pursuant to the rules is adequate. A supplement must contain explicit references to the effective tariff pages during the suspension period so that appropriate rates can be ascertained with a minimum of confusion. Section 61.193 begins with the phrase "If the Commission vacates a suspension order" and any further language clarification appears to be unnecessary. The rule does not contain any reference to suspensions that expire by operation of law and a supplement does not have to be filed in this case. No other parties filed comments to indicate that these proposed sections were confusing or needed modification. These proposed rules will be adopted without changes.

94. *Proposed Section 1.773 (a) (iv).* AT&T proposed to add this section to the Commission's rules: "Any petition to suspend or reject filed by a party offering the same or closely substitutable services or offerings must be accompanied by an exhibit displaying the rate structure, rates and terms under which such party offers the competing services." AT&T stated that the purpose of this section was to dissuade competitors from using the regulatory structure in anticompetitive ways. One of the anticompetitive ways cited was that these petitions caused delays which affected AT&T and its customers directly. Several commenting parties objected to this proposal as burdensome and anticompetitive. Many commenters stated that this information is irrelevant to the Commission's analysis of justness and reasonableness pursuant to 47 U.S.C. § 202. Others commented that AT&T's proposal is anticompetitive because it has a chilling effect on potential petitioners and it removes pricing uncertainty that is crucial to a competitive environment. Another argument put forth is that a petitioner who complains of competitive injury has the obligation to substantiate its claim and to choose the appropriate methods for proving this injury.

95. While we cannot precisely discern the motives of those who participate in our proceedings, we do recognize that parties may seek to use our processes to delay competitive offerings. We consider the present petitioning procedures under Section 1.773 to be satisfactory. Since the Commission determines whether a petition should be denied or approved, delays in effective tariff dates will only occur when Commission review warrants it. Therefore, the filing carrier will not experience any delays as

a result of spurious petitions. For the foregoing reasons, AT&T's proposed section 1.773 (a) (iv) will not be adopted.

96. *Miscellaneous Proposals.* The following proposals were not associated with any specific section of Part 61 but were included in the comments received in response to the NPRM.

a. *SNET* proposed that Part 61 be published in an easily updatable looseleaf binder. We understand the appeal of this method of publication. The Commission, however, is subject to the publishing requirements of the Government Services Administration and no change in the rules format has been contemplated or arranged for at this time. Since the NPRM was the first overall revision to Part 61 in forty-five years, we do not envision extensive future rule changes that would warrant the use of a looseleaf binder. We shall not adopt SNET's proposal and the rules will continue to be published in pamphlet form.

b. *ADAPSO* proposed that tariff filing materials be produced in machine readable form to ease the Commission's administrative burden. At the present time, the Commission does not have the capability to accept electronic tariff filings. While this method would have obvious advantages, there are no present plans or ongoing studies to convert the tariff process to an electronic filing system and there is no projection for such studies contained in the budgets for the next two fiscal years. For this reason, ADAPSO's proposal will not be adopted.

c. *MCI* requested streamlined regulation for non-dominant international carriers. MCI indicated that consumers would be the ultimate beneficiaries if non-dominant international carriers were allowed to file presumptively lawful tariffs on fourteen days' notice like non-dominant domestic carriers. This request is clearly beyond the scope of this Part 61 Rulemaking and should be dealt with in the Competitive Carrier Rulemaking.

Part 61 Revisions — Final Analysis

97. The final text of Part 61 as contained in Appendix A represents the accomplishment of our objectives set out in the NPRM. These goals included the clarification and the streamlining of the rules that would facilitate competition by reducing lead time for the introduction of new services and by minimizing carrier exposure to the regulatory process to the extent possible. In addition, we have reformed the regulations to retain only those requirements that are necessary for carrying out responsible oversight functions in accordance with our mandate under the Communications Act.

98. We have taken into account the various issues raised by the public concerning the proposed rules. As a result of these comments and whenever compatible with the stated objectives, we have modified our proposals. Although all comments may not be specifically cited, all have

been considered. We shall continue in the future to examine alternatives that will reduce burdens and eliminate any unnecessary regulations.

Ordering Clauses

99. Authority for this rulemaking is contained in Section 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

100. Accordingly, IT IS ORDERED, that Part 61 and Part 1 of the Commission's Rules and Regulations are amended as specified in Appendices A and B, effective thirty days after publication of this Report and Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Part 61 of Chapter 1 of TITLE 47 of the Code of Federal Regulations is revised in its entirety as follows:

FINAL PART 61 RULES

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61.171 Adoption notice.
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61.192 Contents of supplement announcing suspension.
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AUTHORITY: §§61.1 to 61.193 issued under sec. 4, 48 Stat. 1066, as amended; 47 U.S.C.154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

§61.1 Purpose and Application.

(a) The purpose of this part is to prescribe the framework for the initial establishment of and subsequent revisions to tariff publications.

(b) Tariff publications filed with the Commission must conform to the rules in this part. Failure to comply with any provision of this part may be grounds for rejection of the non-complying publication.

(c) No carrier required to file tariffs may provide any interstate or foreign communication service until every tariff publication for such communication service is on file with the Commission and in effect.

§61.2 Clear and explicit explanatory statements.

In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

DEFINITIONS

§61.11 Act.

The Communications Act of 1934 (48 Stat. 1004; 47 U.S.C. Chapter 5), as amended.

§61.12 Carriers.

(a) Concurring carrier.

A carrier (other than a connecting carrier) subject to the act which concurs in and assents to schedules of rates and regulations filed on its behalf by an issuing carrier or carriers.

(b) Connecting Carrier.

A carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier.

(c) Dominant Carrier.

A carrier found by the Commission to have market power (i.e. power to control prices.)

(d) Issuing Carrier.

A carrier subject to the Act which publishes and files a tariff or tariffs with the Commission.

(e) Non-Dominant Carrier.

A carrier not found to be dominant.

(f) Other Participating Carrier.

A carrier subject to the Act which publishes a tariff containing rates and regulations applicable to the portion of through service it furnishes in conjunction with another subject carrier.

§61.13 Change in Rate Structure.

A restructuring of the rate components for an existing service.

§61.14 Charges.

The price for service based on tariffed rates.

§61.15 Commercial Contractor.

The commercial firm to whom the Commission annually awards a contract to make copies of Commission records for sale to the public.

§61.16 Commission.

The Federal Communications Commission.

§61.17 Corrections.

The remedy of errors in typing, spelling, or punctuation.

§61.18 New Service Offering.

A tariff filing which provides for a class or sub-class of service not previously offered.

§61.19 Rate.

The tariffed price per unit of service.

§61.20 Rate Increase.

Any change in a tariff which results in an increased rate or charge to any of the filing carrier's customers.

§61.21 Regulations.

The body of carrier prescribed rules in a tariff governing the offering of service in that tariff including rules, practices, classifications and definitions.

§61.22 Supplement.

A publication filed as part of a tariff for the purpose of suspending or cancelling that tariff, or tariff publication and numbered independently from the tariff page series.

§61.23 Tariff.

Schedules of rates and regulations filed by common carriers.

§61.24 Tariff Publication, or Publication.

A tariff, supplement, revised page, additional page, concurrence, notice of revocation, adoption notice, or any other schedule of rates or regulations.

§61.25 Text Change.

A change in the text of a tariff which does not result in a change in any rate or regulation.

§61.26 United States.

The several States and Territories, the District of Columbia, and the possessions of the United States.

GENERAL RULES

§61.31 Removed.

§61.32 Method of filing publications.

Publications sent for filing must be addressed to "Secretary, Federal Communications Commission, Washington, D.C. 20554." Two copies of tariff publications must be filed under a letter of transmittal. The date on which the publication is received by the Secretary of the Commission, or by the Mail Room where submitted by mail, is considered the official filing date. Simultaneously with the filing of the publication, and by the same means, the issuing carrier must send a copy of the publication, supporting information specified in Section 61.38, and transmittal letter to (1) the commercial contractor (at its office on Commission premises) and (2) the Chief, Tariff Review Branch. The latter should be clearly labelled as the "Public Reference Copy." The copies of supporting information required here are in addition to those required by Section 61.38(c).

§61.33 Letters of Transmittal.

(a) All publications filed with the Commission must be accompanied by a letter of transmittal, 8½ by 11 inches in size. All letters of transmittal must (1) concisely explain the nature and purpose of the filing; (2) specify whether supporting information under Section 61.38 is required; (3) state whether copies have been delivered to the Commercial Contractor and Chief, Tariff Review Branch as required by Section 61.32.

(b) In addition to the requirements set forth in (a), the letter of transmittal must specifically reference by number any special permission necessary to implement the tariff publication. Special permission must be granted prior to the filing of the tariff publication, and may not be requested in the transmittal letters.

(c) The letter of transmittal must be substantially in the following format.

_____
(Exact name of carrier in full)

_____
(Post Office Adress)

_____, 19____
(Date)

Transmittal No. _____
Secretary,
Federal Communication Commission
Washington, D.C. 20554

ATTENTION: Common Carrier Bureau

The accompanying tariff (or other publication) issued by _____, and bearing FCC No._____, effective _____, 19_____, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. (Here give the additional information required).

_____
(Name of issuing officer or agent)

_____
(Title)

(d) A separate letter of transmittal may accompany each publication, or the above format may be modified to provide for filing as many publications as desired with one transmittal letter.

Note: If a receipt for the accompanying publication is desired, the letter of transmittal must be sent in duplicate. One copy showing the date of receipt by the Commission will then be returned to the sender.

§61.34 Removed.

§61.35 Delivered free of charges.

Tariff publications must be delivered to the Commission free from all charges, including claims for postage.

§61.36 Tariff publications not returned.

Tariff publications will not be returned.

§61.38 Supporting information to be submitted with letters of transmittal.

(a) *Scope.* This section applies to dominant carriers whose annual gross revenues exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. However, the Commission may require any carrier to submit such information as may be necessary for review of a tariff filing.

(b) *Explanation and data supporting either changes or new tariff offerings.* The material to be submitted for a tariff change which affects rates or charges or for a tariff offering a new service, must include an explanation of the changed or new matter, the reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter.

(1) For a tariff change the carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A cost of service study for all elements for the most recent 12 month period;

(ii) A study containing a projection of costs for a representative 12 month period; and

(iii) Estimates of the effect of the changed matter on the traffic and revenues from the service to which the changed matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (ii) above.

(2) For a tariff filing offering a new service, the carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A study containing a projection of costs for a representative 12 month period; and

(ii) Estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (i) above.

(c) *Working papers and statistical data.* (1) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the Chief, Tariff Review Branch must be provided two sets of working papers containing the

information underlying the data supplied in response to paragraph (b) of this section, and a clear explanation of how the working papers relate to that information.

(2) All statistical studies must be submitted and supported in the form prescribed in Section 1.363 of the Commission's Rules.

(d) *Form and content of additional material to be submitted with certain rate increases.* In the circumstances set out in (1) and (2) below, the filing carrier must submit all additional cost, marketing and other data underlying the working papers to justify a proposed rate increase. The carrier must submit this information in suitable form to serve as the carrier's direct case in the event the rate increase is set by the Commission for investigation.

(1) Rate increases affecting single services or tariffed items.

(i) A rate increase in any service or tariffed item which results in more than $1 million in additional annual revenues, calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A single rate increase in any service or tariffed item, or successive rate increases in the same service or tariffed item within a 12 month period, either of which results in:

(A) at least a 10 per cent increase in annual revenues from that service or tariffed item, and

(B) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(2) Rate increases affecting more than one service or tariffed item.

(i) A general rate increase in more than one service or tariffed item occurring at one time, which results in more than $1 million in additional revenues calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A general rate increase in more than one service or tariffed item occurring at one time, or successive general rate increases in the same services or tariffed items occurring within a 12 month period, either of which results in:

(A) at least a 10 per cent increase in annual revenues from those services or tariffed items, and

(B) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(e) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data required by paragraphs (b) and (c) of this section on the date the issuing carrier files the tariff matter with the Commission.

(f) *Copies of explanation and data to customers.* Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated costs, the offering carrier must transmit to the customer a copy of the explanation and data required by paragraphs (b) and (c) of this section.

§61.39 Removed.

§61.40 Private Line Rate Structure Guidelines.

(a) The Commission uses a variety of tools to determine whether a carrier's private line tariffs are just, reasonable, and nondiscriminatory. The carrier's burden of cost justification can be reduced when its private line rate structures comply with the following five guidelines.

(1) Rate structures for the same or comparable services should be integrated;

(2) Rate structures for the same or comparable services should be consistent with one another;

(3) Rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics; a rate element which appears separately in one rate structure should appear separately in all other rate structures;

(4) Rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and

(5) Rate structures should be simple and easy to understand.

(b) The guidelines do not preclude a carrier, in a given case when a private line tariff does not comply with these guidelines, from justifying its departure from the guidelines and showing that its tariff is just, reasonable, and nondiscriminatory.

SPECIFIC RULES FOR TARIFF PUBLICATIONS

§61.51 Removed.

§61.52 Form, size, type, legibility, etc.

(a) All tariff publications must be in loose-leaf form of size 8½ by 11 inches, and must be plainly printed in black print on white paper of durable quality. Less than 6-point type may not be used. Erasures or alterations in writing must not be made in any tariff publication filed with the Commission or in those copies posted for public convenience. A margin of no less than one inch in width must be allowed at the left edge of every tariff publication.

(b) Pages of tariffs must be printed on one side only, and must be numbered consecutively and designated as "Original title page," "Original page 1," "Original page 2," etc.

(1) All such pages must show, in the upper left-hand corner the name of the issuing carrier; in the upper right-hand corner the FCC number of the tariff, with the page designation directly below; in the lower left-hand corner the issued date; in the lower right-hand corner the effective date; and at the bottom, center, the street address of the issuing officer. The carrier must also specify the issuing officer's title either at the bottom center of all tariff pages, or on the title page and check sheet only.

(2) As an alternative, the issuing carrier may show in the upper left-hand corner the name of the issuing carrier, the title and street address of the issuing officer, and the issued date; and in the upper right hand corner the FCC number of the tariff, with the page designation directly below, and the effective date. The carrier must specify the issuing officer's title in the upper left-hand corner of either all tariff pages, or on the title page and check sheet only. A carrier electing to place the information at the top of the page should annotate the bottom of each page to indicate the end of the material, e.g., a line, or the term "Printed in USA," or "End".

(3) Only one format may be employed in a tariff publication.

§61.53 Consecutive numbering.

Carriers should file tariff publications under consecutive FCC numbers. If this cannot be done, a memorandum containing an explanation of the missing number or numbers must be submitted. Supplements to a tariff must be numbered consecutively in a separate series.

§61.54 Composition of tariffs.

(a) Tariffs must contain in consecutive order: a title page; check sheet; table of contents; list of concurring, connecting, and other participating carriers; explanation of symbols and abbreviations; application of tariff; general rules (including definitions), regulations, exceptions and conditions; and rates. If the issuing carrier elects to add a section assisting in the use of the tariff, it should be placed immediately after the table of contents.

(b) The title page of every tariff and supplement must show:

(1) *FCC number, indication of cancellations.* In the upper right-hand corner, the designation of the tariff or supplement as "FCC No. _____," or "Supplement No. _____ to FCC No. _____," and immediately below, the FCC number or numbers of tariffs or supplements cancelled thereby.

(2) *Name of carrier, class of service, geographical application, means of transmission.* The exact name of the carrier, and such other information as may be necessary to identify the carrier issuing the tariff publication; a brief statement showing each class of service provided; the geographical application; and the type of facilities used to provide service.

(3) *Expiration Date.* When the entire tariff or supplement is to expire with a fixed date, the expiration date must be shown in connection with the effective date in the following manner:

Expires at the end of _____ (date) unless sooner canceled, changed or extended.

(4) *Title and address of issuing officer.* The title and street address of the officer issuing the tariff or supplement in the format specified in Section 61.52.

(5) *Revised title page.* When a revised title page is issued, the following notation must be shown in connection with its effective date:

Original tariff effective _____ (here show the effective date of the original tariff).

(c)

(1) The page immediately following the title page must be designated as "Original page 1" and captioned "Check Sheet." When the original tariff is filed, the check sheet must show the number of pages contained in the tariff. For example, "Page 1 to 150, inclusive, of this tariff are effective as of the date shown." When new pages are added, they must be numbered in continuing sequence, and designated as "Original page _____." For example, when the original tariff filed has 150 pages, the first page added after page 150 is to be designated as "Original page 151," and the foregoing notation must be revised to include the added pages.

(2) If pages are to be inserted between numbered pages, each such page must be designated as an original page and must bear the number of the immediately

preceding page followed by an alpha or numeric suffix. For example, when two new pages are to be inserted between pages 44 and 45 of the tariff, the first inserted page must be designated as Original page 44A or 44.1 and the second inserted page as Original page 44B or 44.2. Issuing carriers may not utilize both the alpha and numeric systems in the same publication.

(3) When pages are revised, when new pages (including pages with letter or numeric suffix as set forth above) are added to the tariff, or when supplements are issued, the check sheet must be revised accordingly. Revised check sheets must indicate with an asterisk the specific pages added or revised. In addition to the notation in (1), the check sheet must list, under the heading "The original and revised pages named below (and Supplement No. _____) contain all changes from the original tariff that are in effect on the date shown," all original pages in numerical order that have been added to the tariff and the pages which have been revised, including the revision number. For example:

Page	*Number of revision except as indicated*
Title	1st
1	8th*
3	5th
5A	Orig.*
10	8th*
151	Orig.*

(4) Changes in, and additions to tariffs must be made by reprinting the page upon which a change or addition is made. Such changed page is to be designated as a revised page, cancelling the page which it amends. For example, "First revised page 1 cancels original page 1," or "Second revised page 2 cancels first revised page 2," etc. When a revised page omits rates or regulations previously published on the page which it cancels, but such rates or regulations are published on another page, the revised page must make specific reference to the page on which the rates or regulations will be found. This reference must be accomplished by inserting a sentence at the bottom of the revised page that states "Certain rates (or regulations) previously found on this page can now be found on page _____." In addition, the page on which the omitted material now appears must bear the appropriate symbol opposite such material, and make specific reference to the page from which the rates or regulations were transferred. This reference must be accomplished by inserting a sentence at the bottom of the other page that states "Certain rates (or regulations) on this page formerly appeared on page _____."

(5) Rejected pages must be treated as indicated in Section 61.69.

(d) *Table of contents.* The table of contents must contain a full and complete statement showing the exact location and specifying the page or section and page numbers, where information by subjects under general headings will be found. If a tariff contains so small a volume of matter that its title page or its interior arrangement plainly discloses its contents, the table of contents may be omitted.

(e) *Tariff User's guide.* At its option, a carrier may include a section explaining how to use the tariff.

(f) *List of concurring carriers.* This list must contain the exact name or names of carriers concurring in the tariff, alphabetically arranged, and the name of the city or town in which the principal office of every such carrier is located. If there are

no concurring carriers, then the statement "no concurring carriers" must be made at the place where the names of the concurring carriers would otherwise appear. If the concurring carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference to such separate tariff by FCC number must be made in the tariff at the place where such names would otherwise appear.

(g) *List of connecting carriers.* This list must contain the exact name or names of connecting carriers, alphabetically arranged, for which rates or regulations are published in the tariff, and the name of the city or town in which the principal office of every such carrier is located. If there are no connecting carriers, then the statement "no connecting carriers" must be made at the place where their names would otherwise appear. If connecting carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference to such separate tariff by FCC number must be made in the tariff at the place where such names would otherwise appear.

(h) *List of other participating carriers.* This list must contain the exact name of every other carrier subject to the Act engaging or participating in the communication service to which the tariff or supplement applies, together with the name of the city or town in which the principal office of such carrier is located. If there is no such other carrier, then the statement "no participating carriers" must be made at the place where the names of such other carriers would otherwise appear. If such other carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference must be made in the tariff at the place where such names would otherwise appear. The names of concurring and connecting carriers properly listed in a tariff published by any other participating carrier need not be repeated in this list.

(i)

(1) *Symbols, reference marks, abbreviations.* The tariff must contain an explanation of symbols, reference marks, and abbreviations of technical terms used. The following symbols used in tariffs are reserved for the purposes indicated below:

R to signify reduction.

I to signify increase.

C to signify changed regulation.

T to signify a change in text but no change in rate or regulation.

S to signify reissued matter.

M to signify matter relocated without change.

N to signify new rate or regulation.

D to signify discontinued rate or regulation.

Z to signify a correction.

(2) The uniform symbols must be used as follows.

(i) When a change of the same character is made in all or in substantially all matter in a tariff, it may be indicated at the top of the title page of the tariff or at the top of each affected page, in the following manner: "All rates in this tariff are

increases," or, "All rates on this page are reductions, except as otherwise indicated."

(ii) When a change of the same character is made in all or substantially all matters on a page or supplement, it may be indicated at the top of the page or supplement in the following manner: "All rates on this page (or supplement) are increases," or, "All rates on this page (or supplement) are reductions except as otherwise indicated."

(3) Items which have not been in effect 30 days when brought forward on revised pages must be shown as reissued, in the manner prescribed in Section 61.54(i)(1). Items which have been in effect 30 days or more and are brought forward without change on revised pages must not be shown as reissued items.

(j) *Rates and general rules, regulations, exceptions and conditions.* The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate. Rates must be expressed in United States currency, per chargeable unit of service for all communication services, together with a list of all points of service to and from which the rates apply. They must be arranged in a simple and systematic manner. Complicated or ambiguous terminology may not be used, and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition named in any other tariff.

§61.55 Removed.

§61.56 Supplements.

A carrier may not file a supplement except to suspend or cancel a tariff publication.

§61.57 Cancellations.

The following paragraphs govern the cancellation of tariffs and supplements.

(a) *By tariff or supplement.* A carrier may cancel any tariff or supplement in whole or in part by another tariff or supplement. Cancellation of a tariff automatically cancels every supplement to that tariff, except a cancelling supplement.

(b) *By expiration.* Subject to Section 61.59, a carrier may cancel a tariff or supplement in whole or in part by fixing a date on which the rates or regulations will expire.

(c) *Indication of.* (1) A carrier which cancels a tariff or supplement in whole by another tariff or supplement must comply with Section 61.54(b)(1). Cancellation of tariffs or supplements in whole by expiration must be indicated as provided in Section 61.54(b)(3).

(2) Where a carrier issues a tariff, supplement, or revised page partially cancelling another tariff, supplement, or revised page, it must specifically state what portion of the other tariff publication is cancelled. Such other tariff or supplement must at the same time be correspondingly amended, effective on the same date.

(3) When only a part of a tariff or supplement is to expire, a carrier must show the expiration date on the same page, and associate it with the matter which is to

expire. Changes in expiration date must be made pursuant to the notice requirements of Section 61.58, unless otherwise authorized by the Commission. Expirations must be indicated as follows:

Expires at the end of _____ (date) unless sooner cancelled, changed or extended.

(d) *Rates and regulations to apply.* When a carrier cancels a tariff or supplement in whole or in part by another tariff or supplement, the cancelling publication must show where all rates and regulations will be found, or what rates and regulations will apply.

(e) *Omissions.* When a tariff or supplement cancelling a previous tariff or supplement omits points of origin or destination, rates or regulations, or routes, which were contained in such tariff or supplement, the new tariff or supplement must indicate the omission in the manner prescribed in paragraph (c) of this section. If such omissions effect changes in rates or regulations, that fact must be indicated by the use of the uniform symbols prescribed in Section 61.54(i)(1).

(f) *Carriers ceasing operations.* Where a carrier ceases operations without a successor, it must cancel its tariffs pursuant to the notice requirements of Section 61.58, unless otherwise authorized by the Commission.

§61.58 Notice requirements.

(a) Every proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section.

(1) Notice is accomplished by filing the proposed tariff changes with the Commission. Any period of notice specified in this section begins on and includes the date the tariff is received by the Commission, but does not include the effective date. If a tariff filing proposes changes governed by more than one of the notice periods listed below, the longest notice period will apply. In computing the notice period required, all days including Sundays and holidays must be counted.

(2) The Chief, Common Carrier Bureau may require the deferral of the effective date of any tariff filing made on less than 90 days' notice, so as to provide for a maximum total of 90 days' notice, regardless of whether petitions under Section 1.773 of the Commission's rules have been filed.

(3) Tariff filings proposing corrections must be made on at least 3 days' notice, and may be filed notwithstanding the provisions of Section 61.59. Corrections to tariff materials not yet effective cannot take effect before the effective date of the original material.

(4) This subsection applies only to dominant carriers. If the tariff publication would increase any rate or charge, or would effectuate an authorized discontinuance, reduction or other impairment of service to any customer, the offering carrier must inform the affected customers of the content of the tariff publication. Such notification should be made in a form appropriate to the circumstance, and may include written notification, personal contact, or advertising in newspapers of general circulation.

(b) *Non-Dominant Carriers.*

Tariff filings of non-dominant carriers must be made on at least 14 days' notice.

(c) *Other Carriers.*

(1) Tariff filings in the instances specified in (i), (ii) and (iii) below must be made on at least 15 days' notice.

(i) Tariffs filed in the first instance by new carriers.

(ii) Tariff filings involving new rates and regulations not previously filed at, from, to or via points on new lines; at, from, to or via new radio facilities; or for new points of radio communication.

(iii) Tariff filings involving a change in the name of a carrier, a change in Vertical and Horizontal coordinates (or other means used to determine airline mileages), a change in the lists of mileages, a change in the lists of connecting, concurring or other participating carriers, text changes, or the imposition of termination charges calculated from effective tariff provisions. The imposition of termination charges does not include the initial filing of termination liability provisions.

(2) Tariff filings involving a change in rate structure, a new service offering, or a rate increase must be made on at least 45 days' notice.

(3) All tariff filings not specifically assigned a different period of public notice in this part must be made on at least 35 days' notice.

§61.59 Effective period required before changes.

Except as provided in Section 61.58(a)(3) or except as otherwise authorized by the Commission, new rates or regulations must be effective for at least 30 days before any change may be made.

§61.60 Removed.

§61.61 Removed.

§61.62 Removed.

§61.63 Removed.

§61.64 Removed.

§61.66 Removed.

§61.67 New or discontinued telephone and teletypewriter service points; mileages.

Message toll telephone service points and teletypewriter exchange service points added or discontinued during a calendar month may be filed not later than 20 days after the end of such month where the basic schedules of rates and regulations applicable to such message toll telephone and teletypewriter exchange service points are effective and the effective date of each addition or discontinuance is shown.

§61.68 Special Notation.

(a) A tariff filing must contain a statement of the authority for any matter to be filed on less than the notice required in Section 61.58. The following format must be used:

"Issued on not less than _____ days' notice under authority of _____ (specific reference to the special permission, decision, order or section of these rules)." If all the matter in a tariff publication is to become effective on less than the notice required in Section 61.58, specific reference to the Commission authority must be shown on the title page. If only a part of the tariff publication is to become

effective on less than the notice required in Section 61.58, reference to the Commission authority must appear on the same page(s), and be associated with the pertinent matter.

(b) When a portion of any tariff publication is issued in order to comply with a Commission order, the following notation must be associated with that portion of the tariff publication: "In compliance with the order of the Federal Communications Commission in _____ (a specific citation to the applicable order should be made)."

§61.69 Rejection.

When a tariff publication is rejected by the Commission, its number may not be used again. The rejected tariff publication may not be referred to as cancelled or revised. The publication that is subsequently issued in lieu of the rejected tariff publication must bear the notation "In lieu of _____, rejected by the Federal Communications Commission."

§61.70 Removed.

§61.71 Reissued matter.

Matter in effect for less than 30 days and brought forward without change from another tariff publication must bear the appropriate symbol provided in Section 61.54(i)(1) for reissued matter. The number and original effective date of the tariff publication in which the matter was originally published must be associated with the reissued matter.

§61.72 Posting.

(a) Offering carriers must post (i.e., keep accessible to the public) during the carrier's regular business hours, a schedule of rates and regulations. This schedule must include all effective and proposed rates and regulations pertaining to the services offered to and from the community or communities served, and must be the same as that on file with the Commission. This posting requirement must be satisfied by the following methods:

(1) Where the filing carrier has an office or offices open to the public in states or territories of the United States, the carrier must post the schedule of rates and regulations in one office in each state or territory of its operation.

(2) A carrier must provide a telephone number for public inquiries about information contained in its tariffs. This telephone number should be made readily available to all interested parties.

(3) A carrier must post a notice in each business office of the carrier open to the public in that state or territory, stating the street address of the location in which the schedule of rates and regulations can be found and the telephone number for public inquiries on tariffs.

(b) The posting of rates and regulations shall be considered timely if they are available for public inspection at the posting locations within 15 days of their filing with the Commission.

§61.73 Duplication of rates or regulations.

A carrier concurring in schedules of another carrier must not publish conflicting or duplicative rates or regulations.

§61.74 References to other instruments.

(a) Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

(b) Tariffs for end-on-end through services may reference the tariffs of other carriers participating in the offering.

(c) Tariffs may reference concurrences for the purpose of stating where rates or regulations applicable to a service not governed by the tariff may be found.

§61.91 Removed.

§61.92 Removed.

§61.93 Removed.

§61.94 Removed.

§61.95 Removed.

§61.96 Removed.

§61.111 Removed.

§61.112 Removed.

§61.113 Removed.

§61.114 Removed.

§61.115 Removed.

§61.116 Removed.

§61.117 Removed.

§61.118 Removed.

§61.119 Removed.

CONCURRENCES

§61.131 Scope.

Sections 61.132 through 61.136 apply to a carrier which must file concurrences reflecting rates and regulations for through service provided in conjunction with other carriers and to a carrier which has chosen, as an alternative to publishing its own tariff, to arrange concurrence in an effective tariff of another carrier. Limited or partial concurrences will not be permitted.

§61.132 Method of filing concurrences.

A carrier proposing to concur in another carrier s effective tariff must deliver two copies of the concurrence to the issuing carrier in whose favor the concurrence is issued. The concurrence must be signed by an officer or agent of the carrier executing the concurrence, and must be numbered consecutively in a separate series

from its FCC tariff numbers. At the same time the issuing carrier revises its tariff to reflect such a concurrence, it must submit both copies of the concurrence to the Commission. The concurrence must bear the same effective date as the date of the tariff filing reflecting the concurrence.

§61.133 Format of concurrence.

(a) Concurrences must be issued in the following format:

CONCURRENCE

F.C.C. Concurrence No. _____
(Cancels F.C.C. Concurrence No. _____)
(Name of Carrier_____)
(Post Office Address_____)
_____, 19____
(Date)

Secretary,
Federal Communications Commission
Washington D.C. 20554

This is to report that _____ assents to and
(name of concurring carrier)
concurs in the tariffs described below. _____
(name of concurring carrier)
thus makes itself a party to these tariffs and obligates itself (and its connecting carriers) to observe every provision in them, until a notice of revocation is filed with the Commission and delivered to the issuing carrier.

This concurrence applies to interstate (and foreign) communication:

1. Between the different points on the concurring carrier's own system;
2. Between all points on the concurring carrier's system and the systems of its connecting carriers; and
3. Between all points on the system of the concurring carrier and the systems of its connecting carriers on the one hand, and, on the other hand, all points on the system of the carrier issuing the tariff or tariffs listed below and the systems of its connecting carriers and other carriers with which through routes have been established.

(NOTE: Any of the above numbered paragraphs may be omitted or the wording modified to state the points to which the concurrence applies.)

TARIFF

(Here describe the tariff or tariffs concurred in by the carrier, specifying FCC number, title, date of issuance, and date effective. Example: A.B.C. Communications Company, Tariff FCC No. 1, Interstate Telegraph Message Service, Issued January 1, 1983, Effective April 1, 1983).

Cancels FCC Concurrence No. ____, effective _____, 19____.

_____
(Name of concurring carrier)

By_____
(Title)

(b) No material is to be included in a concurrence other than that indicated in the above-prescribed form, unless specially authorized by the Commission. A concurrence in any tariff so described will be deemed to include all amendments and successive issues which the issuing carrier may make and file. All such amendments and successive issues will be binding between customers and carriers. Between carriers themselves, however, the filing by the issuing carrier of an amendment or successive issue with the Commission must not imply or be construed to imply an agreement to the filing by concurring carriers. Such filings do not affect the contractual rights or remedies of any concurring carrier(s) which have not, by contract or otherwise, specifically consented in advance to such amendment or successive issue.

§61.134 Concurrences for through services.

A carrier filing rates or regulations for through services between points on its own system and points on another carrier's system (or systems), or between points on another carrier's system (or systems), must list all concurring, connecting or other participating carriers as provided in Sections 61.54(f), (g) and (h). A concurring carrier must tender a properly executed instrument of concurrence to the issuing carrier. If rates and regulations of the other carriers engaging in the through service(s) are not specified in the issuing carrier's tariff, that tariff must state where the other carrier's rates and regulations can be found. Such reference(s) must contain the FCC number(s) of the referenced tariff publication(s), the exact name(s) of the carrier(s) issuing such tariff publication(s), and must clearly state how the rates and regulations in the separate publications apply.

§61.135 Concurrences for other purposes.

When an issuing carrier permits another carrier to concur in its tariff, the issuing carrier's tariff must state the concurring carrier's rates and points of service.

§61.136 Revocation of concurrences.

A concurrence may be revoked by a revocation notice or cancelled by a new concurrence. A revocation notice or a new concurrence, if less broad in scope than the concurrence it cancels, must bear an effective date not less than 45 days after its receipt by the Commission. A revocation notice is not given a serial number, but must specify the number of the concurrence to be revoked and the name of the carrier in whose favor the concurrence was issued. It must be in the following format:

REVOCATION NOTICE

_____
(Name of carrier)

_____
(Post office address)

_____, 19____

(Date)

Secretary,
Federal Communications Commission
Washington, D.C. 20554

Effective _____, 19____ FCC Concurrence No. _____, issued by _____
(Name of concurring carrier)
in favor of _____ is
(Name of issuing carrier)
hereby cancelled and revoked. Rates and regulations of _____
(Name of concurring carrier)
and its connecting carriers will thereafter be found in Tariff FCC No. _____ issued by _____ (If the concurring carrier has ceased operations, the revocation notice must so indicate.)

_____
(Name of carrier)

By_____

_____
(Title)

§61.137 Removed.

APPLICATIONS FOR SPECIAL PERMISSION

§61.151 Scope.

Sections 61.152 and 61.153 set forth the procedures to be followed by a carrier applying for a waiver of any of the rules in this part.

§61.152 Terms of applications and grants.

Applications for special permission must contain (1) a detailed description of the tariff publication proposed to be put into effect; (2) a statement citing the specific rules and the grounds on which waiver is sought; and (3) a showing of good cause. If approved, the carrier must comply with all terms and use all authority specified in the grant. If a carrier elects to use less than the authority granted, it must apply to the Commission for modification of the original grant. If a carrier elects not to use the authority granted within sixty days of its effective date, the original grant will be automatically cancelled by the Commission.

§61.153 Method of filing applications.

A carrier applying for special permission must submit two copies of the application (including illustrative tariff pages, associated amendments and exhibits) to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Simultaneously, and by the same means, a carrier must furnish a separate copy with all attachments to the Chief, Tariff Review Branch. If a carrier applies for special permission to revise joint tariffs, the application must state that it is filed on behalf

of all carriers participating in the affected service. Applications must be numbered consecutively in a series separate from the FCC tariff numbers, bear the signature of the officer or agent of the carrier, and be in the following format:

Application No._____

_____
(Date)

Secretary,
Federal Communications Commission
Washington, D.C. 20554

Attention: Common Carrier Bureau

(here provide the statements required by Section 61.152).

_____
(Exact name of carrier)

_____
(Name of officer or agent)

_____
(Title of officer or agent)

ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS

§61.171 Adoption notice.

*

When a carrier's name is changed, or its operating control transferred from one carrier to another in whole or in part, the successor carrier must file tariff revisions to reflect the name change. The successor carrier may either immediately reissue the entire tariff in its own name, or immediately file an adoption notice. Within 35 days of filing an adoption notice, the successor must reissue the entire tariff in its own name. The reissued tariff must be numbered in the series of the successor carrier, and must contain all original pages without changes in regulations or rates. The transmittal letter must state the tariff is being filed to show a change in the carrier's name pursuant to Section 61.171 of the Commission's Rules. The adoption notice, if used, must read as follows:

The _____ here adopts,
(Exact name of successor carrier or receiver)
ratifies and makes its own in every respect, all applicable tariffs and amendments filed with the Federal Communications Commission by _____ prior to _____.
(predecessor) (date)

§61.172 Changes to be incorporated in tariffs of successor carrier.

When only a portion of properties is transferred to a successor carrier, that carrier must incorporate in its tariff the rates applying locally between points on the transferred portion. Moreover, the predecessor carrier must simultaneously cancel the corresponding rates from its tariffs, and reference the FCC number of the successor carrier's tariff containing the rates that will thereafter apply.

§61.173 Removed.

§61.174 Removed.

SUSPENSIONS

§61.191 Carrier to file supplement when notified of suspension.

If a carrier is notified by the Commission that its tariff filing has been suspended, the carrier must file immediately a consecutively numbered supplement without an effective date, which specifies the schedules which have been suspended.

§61.192 Contents of supplement announcing suspension.

(a) A supplement announcing a suspension by the Commission must specify the term of suspension imposed by the Commission.

(b) A supplement announcing a suspension of either an entire tariff or a part of a tariff publication, must specify the applicable tariff publication effective during the period of suspension.

§61.193 Vacation of suspension order; supplements announcing same; etc.

If the Commission vacates a suspension order, the affected carrier must issue a supplement or revised page stating the Commission's action as well as the lawful schedules.

APPENDIX B

Part 1 of Chapter 1 of TITLE 47 of the Code of Federal Regulations is amended by revising Section 1.773(a)(1) and by adding Section 1.773(b)(iv) as follows:

Part 1 - Practice and Procedure

§1.773 Petitions for suspension and investigation, or rejection of new or revised tariff filings.

(a) *** - (1) ***

(i) Petitions seeking suspension and investigation, or rejection of a new or revised tariff filing or any provision of such a publication, must specify the pertinent Federal Communications Commission tariff number and carrier transmittal number; the matters protested; and the specific reasons why the tariff warrants suspension and investigation, or rejection. When a single petition asks for more than one form of relief, it must separately and distinctly plead and support each form of relief. However, no petition may ask that it also be considered a formal complaint. Formal complaints must be separately lodged, as provided in Section 1.721.

(ii) For purposes of this section, tariff filings by non-dominant carriers will be considered *prima facie* lawful, and will not be suspended by the Commission unless the petition requesting suspension shows:

(A) That there is a high probability the tariff would be found unlawful after investigation;

(B) That the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;

(C) That irreparable injury will result if the tariff filing is not suspended; and

(D) That the suspension would not otherwise be contrary to the public interest.

* * * * *

(b) ***

(iv) Where all petitions against a tariff filing have not been filed on the same day, the publishing carrier may file a consolidated reply to all the petitions. The time for filing such a consolidated reply will begin to run on the last date for timely filed petitions, as fixed by (a)(2)(i)-(iii) of this section, and the date on which the consolidated reply is due will be governed by (b)(1)(i)-(iii) of this section.

Frequency Allocation, Amateur
Frequency Allocation, Requirements

Memorandum Opinion and Order denied Petitions for Reconsideration which request that the 2310-2390 MHz band be allocated on a secondary basis to the amateur service. Current bands allocated to amateur service are adequate to meet amateur service spectrum requirements.
—*Amendment of Part 2*
GEN Docket No. 80-739

FCC 84-306

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 2 of the Commission's Rules Regarding Implementation of the Final Acts of the World Administrative Radio Conference, Geneva, 1979.	Gen Docket 80-739

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1984; Released: July 2, 1984

BY THE COMMISSION:

1. The Commission has under consideration two Petitions for Reconsideration, which were filed by the Southern California Repeater and Remote Base Association (SCRRBA) and the American Radio Relay League, Incorporated (ARRL). Both petitions seek reversal, in part, of the Commission's decision in the *Second Report and Order* (*Order*) in General Docket 80-739.[1] In the *Order*, the 2310-2390 MHz band was allocated for primary Government/non-Government mobile use, primary Government radiolocation use and secondary Government fixed use. The existing secondary amateur allocation was deleted. The new primary allocation to the Government/non-Government mobile service is to provide spectrum for aeronautical telemetry and telecommand for the testing

[1] The Second Report and Order in General Docket 80-739 was adopted on November 8, 1983, and released on December 8, 1983, (FCC 83-511, 49FR2357 January 19, 1984).

of manned or unmanned aircraft, missiles or other major components thereof.

2. The petitioners request that the secondary allocation be retained in the 2310-2390 MHz band until the possibility of the amateur service sharing the band on a geographical basis with the primary users may be fully explored in a further rulemaking proceeding, such as RM-4077.[2] The petitioners argue that there has not been adequate opportunity to address the matter of geographical sharing of this band by the amateur service, since technical parameters for aeronautical flight test telemetry operations in this band have not yet been established.

3. The new use for this band, aeronautical telemetry and telecommand, involves the safety of life and property. The secondary amateur allocation was deleted from this band in the *Order* to protect this safety service from harmful interference that could result in loss of life. In response to the Petitions for Reconsideration, we believe that there is very little possibility for geographical sharing, as these frequencies will be used for aeronautical telemetry at various locations throughout the United States, including military bases in California and on the East Coast. SCRRBA pointed out in its petition that the separation distance necessary to provide protection to high flying aircraft at this frequency in a "worst case" scenario is 387 nautical miles (445 statute miles). Thus a military base using these frequencies would require a circular protection area about 900 miles across. Further, there is a possibility of interference from the amateur service even if geographical sharing is implemented, as amateur licensees are not required to notify the Commission when they move their operations on a temporary basis. It is possible, therefore, that an amateur licensee, unaware of geographical restrictions in this band, could move a transmitter into a restricted area and operate it without the Commission's knowledge or approval. While the risk of such interference taking place would be low, it cannot be ignored. For these reasons, we do not believe that sharing this band with the amateur service is a viable alternative and, therefore, see no reason to allow the amateur service to continue using this band while possible geographical sharing criteria are explored.

4. Further, we believe that the seven bands allocated to the amateur service in the microwave region of the spectrum, including the two bands immediately adjacent to the 2310-2390 MHz band (2300-2310 MHz and 2390-2450 MHz), are adequate to meet the amateur services spectrum requirements in this region of the spectrum.

[2] RM-4077 (General Docket 84-186) is a proceeding currently before the Commission. It is in response to a petition filed by the Aerospace and Flight Test Radio Coordinating Council and addresses the use of the 2310-2390 MHz band for aeronautical telemetry.

5. In view of the reasons advanced herein and pursuant to the authority found in Section 4(i) of the Communications Act of 1934, as amended, the Petitions for Reconsideration ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Frequency Allocation
Frequency Allocation, Table of Frequency Allocations

Order adopted amending Part 2 of the Rules to provide a nonGovernment allocation in the 2285-2290 MHz band, which allows nonGovernment space operations access to the Tracking and Data Relay Satellite Systems.
—*Amendment of Part 2*

FCC 84-405

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part 2 of the Commission's Rules providing an allocation in the 2285-2290 MHz band to allow access for nonGovernment space operations to the Tracking and Data Relay Satellite System.

ORDER

Adopted: August 27, 1984; Released: August 30, 1984

BY THE COMMISSION:

1. The Tracking and Data Relay Satellite System (TDRSS), which relays data from space research, space operations and earth exploration-satellite systems to earth stations, is owned and operated by the National Aeronautics and Space Administration (NASA). TDRSS operates in the band 2200-2290 MHz, which is currently allocated exclusively for Government use. However, NASA, as a matter of policy, has offered use of TDRSS to nonGovernment space users (NASA Management Instruction 8410.3). NTIA has approved this nonGovernment use of the Government band. Therefore, the Commission is making a nonGovernment allocation in the 2285-2290 MHz band to provide nonGovernment space operations access to TDRSS. It is only necessary to allocate this one band as TDRSS is a complete system with all of the necessary space-to-earth links. Therefore, all that is needed by the nonGovernment user is the feeder link to TDRSS. To accomplish this we are adopting a footnote to the Table of Frequency Allocations, Section 2.106 of the Rules. The footnote has been

coordinated with the Government sector through the Interdepartment Radio Advisory Committee. The footnote reads as follows:

US303 In the band 2285-2290 MHz, nonGovernment space stations in the space research, space operations and earth exploration-satellite services may be authorized to transmit to the Tracking and Data Relay Satellite System subject to such conditions as may be applied on a case-by-case basis. Such transmissions shall not cause harmful interference to authorized Government stations. The power flux density at the Earth's surface from such nonGovernment stations shall not exceed -144 to -154 dBW/m^2/4 kHz, depending on angle of arrival, in accordance with ITU Radio Regulation 2557.

The appropriate modifications necessary to amend Section 2.106 of the Commission's Rules are contained in the Appendix.

2. We find that good cause exists to excuse compliance with the notice and comment provisions of the Administrative Procedure Act (5 U.S.C. §553). This amendment will not affect existing FCC licensees and reflects an NTIA action regarding a Government band, which simply provides for a nonGovernment allocation in the band. Moreover, we would not expect such a Notice to generate adverse comments. In short, public notice and comment appears unnecessary. Furthermore, because this footnote provides additional opportunity for the nonGovernment sector and, thus relieves a restriction on the use of spectrum, we find good cause exists for making this action effective immediately.

3. Accordingly, IT IS ORDERED, that Section 2.106 is amended as set forth in the Appendix. Authority for this action is contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended. These amendments become EFFECTIVE immediately after publication of this ORDER in the Federal Register.

4. Point of contact on this matter is Fred Thomas (202) 653-8171.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations.

Section 2.106 is amended by adding footnote designator US303 at columns 4 and 5 in the 2200-2290 MHz band and by adding the text of footnote US303 to the list of footnotes following the Table of Frequency Allocations.

§2.106 Table of Frequency Allocations.

UNITED STATES TABLE		FCC USE DESIGNATORS	
GOVERNMENT	NON-GOVERNMENT		
Allocation (MHz) (4)	Allocation (MHz) (5)	Rule Part(s) (6)	Special Use Frequencies (7)
* * *	* * *	* * *	* * *
2200-2290 FIXED MOBILE SPACE RESEARCH (space-to-Earth) (space-to-Space) US303 G101	2200-2290 US303		

US303 In the band 2285-2290 MHz, non-Government space stations in the space research, space operations and earth exploration-satellite services may be authorized to transmit to the Tracking and Data Relay Satellite System subject to such conditions as may be applied on a case-by-case basis. Such transmissions shall not cause harmful interference to authorized Government stations. The power flux density at the Earth's surface from such nonGovernment stations shall not exceed -144 to -154 dBW/m^2/4 kHz, depending on angle of arrival, in accordance with ITU Radio Regulation 2557.

* * * * *

Computing Device
Equipment Authorization Program
Measurement, Computing Devices
Radio Frequency Device, Authorization
Technical Standards

Order denied further reconsideration concerning amendment of Part 15 of the Rules relating to methods of measurement of radio noise emissions from computing devices. Measurement procedures for determining compliance with these regulations are set forth in FCC Measurement Procedure MP-4, which were developed by Report and Order and Memorandum Opinion and Order in this docket.
—*Amendment of Part 15*
Gen Docket No. 80-284

FCC 84-374

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 15 of the Rules relating to methods of measurement of radio noise emissions from computing devices	Gen Docket 80-284

ORDER DENYING FURTHER RECONSIDERATION

Adopted: July 30, 1984; Released: August 1, 1984

BY THE COMMISSION:

1. The Commission has received a petition from Dash, Straus & Goodhue, Inc., requesting reconsideration of the *Memorandum Opinion and Order* in this docket, adopted July 21, 1983, 48 FR 34748, August 1, 1983, which modified the FCC procedure for measuring radio noise from computing devices. Dash, Straus & Goodhue, Inc., hereafter referred to as Dash, is an independent test laboratory which performs measurements for determining compliance with FCC equipment authorization requirements. Comments opposing the petition were filed by the Computer and Business Equipment Manufacturers Association (CBEMA), to which Dash filed reply comments.

2. In 1979, the Commission promulgated new rules in General Docket 20780 to control the interference potential of digital electronic equipment to radio communications.[1] The regulations governing such equipment, defined as computing devices in Section 15.4(n), are set forth in Part 15, Subpart J (47 CFR Part 15, Subpart J). Implementation of these rules occurred over a four year period to decrease the burden on the electronics industry. All computing devices manufactured after October 1, 1983 must comply with the technical and administrative requirements in Subpart J of Part 15 before they can be legally marketed or imported into the U.S.A.[2]

3. While the test methodology for showing compliance with these rules was specified in general terms in the proceeding in Docket 20780, it was felt that the procedures should be more clearly delineated. Consequently, in 1980, the Commission proposed a detailed test procedure for computing devices in General Docket 80-284. The *Report and Order* in Gen Docket 80-284, adopted February 25, 1981, 46 FR 23240, April 24, 1981, set out detailed measurement procedures in Part 15, Appendix A, based in large part on industry recommendations. In response to a petition for reconsideration filed by the Computer and Business Manufacturers Association, the Commission by the above mentioned *Memorandum Opinion and Order* modified the test procedure to provide greater flexibility and clarify certain aspects of the testing. In addition, the measurement procedure was removed from Part 15, Appendix A and subsequently republished as FCC Measurement Procedure MP-4, "FCC Methods of Measurement of Radio Noise Emissions from Computing Devices."[3]

4. Dash has not heretofore been a party to this proceeding (although correspondence submitted by Dash was discussed in the *Memorandum Opinion and Order*). Dash does not explain why comments were not filed earlier in this proceeding and it does not appear that the current petition is based on facts which were unknown or have changed since the last opportunity to present them to the Commission. Accordingly, the petition does not satisfy the procedural requirement of Section 1.429(b)(1) & (2). Nevertheless, we believe it would be in the public interest to consider the merits of the Dash petition and have accepted the petition as provided in Section 1.429(b)(3).

---

[1] See the *Report and Order* in Docket No. 20780, adopted September 18, 1979, 44 FR 59530, October 16, 1979, and the *Order Granting In Part Reconsideration* in Docket No. 20780, adopted March 27, 1980, 45 FR 24154, April 9, 1980.

[2] Complete information on the computing device rules can be found in Office of Science and Technology (OST) Bulletin 62 "Understanding the FCC Regulations Concerning Computing Devices," available from the FCC Consumer Assistance Office.

[3] FCC Measurement Procedure MP-4 is available from the FCC duplicating contractor: International Transcription Services, 1919 M Street, N.W., Room 248, Washington, D.C. 20554, Tel. (202) 296-7322.

5. In the instant petition, Dash requests additional changes in MP-4 with regard to radiated emissions measurements. MP-4 calls for radiated emissions to be measured on an open field test site with the computer equipment set upon a test platform in a manner similar to conditions of actual use. Measurements may be performed at alternative sites provided that the results are correlateable to an open field. Further details can be found in MP-4. The specific points raised by Dash and CBEMA and the Commission's response are discussed in the following paragraphs.

6. Dash suggests that instead of requiring peripherals to be connected to the host computer via interface cables, as specified in paragraph 4.5.4 of MP-4, tests should be performed with all interface cables left unterminated. This would allegedly improve the repeatability of the measurements and free test laboratories of the need to have on hand a variety of peripherals. CBEMA opposes this suggestion on the grounds that such an arrangement is not representative of what occurs in actual practice. CBEMA points out that compliance often depends upon the proper termination of the interface cables at the peripherals. While we certainly favor any approaches that simplify the measurements, we believe that it is more important to simulate the conditions of actual use as nearly as possible for the tests, whenever practical. Further, we are concerned that such a major shift in measurement philosophy may well result in manufacturers having to redesign products after having just completed design to meet the October 1, 1983 deadline for compliance with the computing device rules.[4] Accordingly, we reaffirm our original decision to perform tests with peripherals connected, as described in paragraph 4.5.4 of MP-4.

7. Dash also takes issue with the provision of paragraph 4.5.4.1 of MP-4 that products having a unique interface port for peripherals not yet available may be tested by attaching a cable extended one meter vertically above the device and left unterminated. According to Dash, the cable should be made 2.5 meters long so that it will be resonant in the range of frequencies where most computer emissions are located, and it should be varied in position to maximize the measured levels as is done with other interface cables. CBEMA, while generally opposed to measurements with unterminated cables, recognizes that there may be a need to provide for unique circumstances. However, CBEMA does not address the specific questions of cable length and position raised by Dash. In our experience, situations where no peripheral is available that can be connected to an interface port arise only occasionally. Any assumptions about cable length and position must, under these circumstances, be somewhat arbitrary. It could for instance also be argued that 1 meter is a typical cable length for

[4] The schedule for compliance with the computing device rules is set forth in Sections 15.814 and 15.834 of the Rules, 47 CFR 15.814, 15.834.

most computers or that emissions are usually higher with cables extended vertically. We find little reason to modify the original instruction.

8. Dash asserts that the language in paragraph 4.5.1 of MP-4 seems to puts insufficient emphasis on the need to shift interface cables to maximize emissions in cases where the computer system is large or complex. Paragraph 4.5.1 states that the equipment configuration and cable positions which yield maximized emissions should generally be determined by trial and error, but for large systems with numerous cables, trial and error tests may better yield to experience and knowledge about the equipment under test. Dash believes that this provision will too often be used to avoid the basic directive to move the cables, when it could be done with some effort. To remedy this perceived problem, Dash suggests that the Commission limit the term large systems to mean those systems weighing more than one ton. CBEMA maintains that the present text of 4.5.1 is adequate based on its members' experience in testing large systems. In our view, the weight of the system is just one factor to be considered in deciding what steps are reasonable towards finding the configuration which maximizes emissions. Other factors might be the number and length of connecting cables. We believe that in view of the diverse nature of computer systems, it is best to allow the test engineer some discretion to configure the system as circumstances may dictate. Therefore we are retaining the present text of paragraph 4.5.1.

9. According to Dash, a new instruction should be added to MP-4 stating that the measurement antenna should have a voltage standing wave ratio (VSWR) of no greater than 1.5. The VSWR is an indicator of how well the antenna impedance is matched to the impedance of the transmission line which carries the received signal to the measurement instrument. The better the match, the more efficient the transfer of energy. (Matching is usually accomplished through use of a circuit known as a balun which is built into the antenna assembly.) Dash explains that if the antenna is poorly matched, the antenna calibration factors, used to convert the antenna output signal to field strength, can become invalid under certain conditions, leading to significant errors in the results. For instance, if the antenna has a poor VSWR *and* the measurement instrument also has a poor VSWR at its input, the double mismatch can produce a magnified error which is not obvious to the test engineer. Additionally, if a different cable is used than the one with which the antenna was calibrated, or an extra length of cable is added, its loss might very well be accounted for incorrectly. The loss of a cable is usually specified for matched conditions, but here the cable would actually be used under mismatched conditions. Complete details are given in an article authored by Mr. Glen Dash and Mr. Isidor Straus entitled "Antennas for EMI Measurement" which appeared in the October, 1983

issue of EMC Technology & Interference Control News, a copy of which can be found in the record for this proceeding. CBEMA agrees that the VSWR of an antenna is an important element in determining the accuracy of test data but asserts that VSWR is merely one of many factors included in the measured antenna factor.

10. We support Dash's argument to the extent that low antenna VSWR is certainly desirable, but we disagree that it is a necessary condition to obtain accurate measurement results. If the antenna VSWR is kept low, concerns about possible mismatch at the measurement instrument are mitigated. However, to our knowledge the VSWR of most modern measurement instruments is very good, which would conversely mitigate the effect of poor antenna VSWR. We concur with CBEMA that if the antenna is used under the same conditions for which it was calibrated, the results should be valid. The points raised by Dash are best addressed by bringing the matter to the attention of the technical community, particularly those groups, such as the American National Standards Committee C.63, who are involved with measurement equipment performance standards.

11. For the reasons given in the foregoing discussion, IT IS ORDERED that the Dash, Straus, and Goodhue, Inc. petition for reconsideration of the *Memorandum Opinion and Order* in this docket IS DENIED. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

12. For further information concerning this Order, contact Mr. Julius P. Knapp, Office of Science and Technology, telephone (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Facility, Modification
FM Station
Rules, Amendments of
Television Channel Assignment

Report and Order adopted amending Part 73 to reflect Commission's policy that broadcast licensees be encouraged to upgrade their facilities in order to better serve their audiences. Commission would be able to modify, in the course of rule making proceedings, the licenses of FM stations to a higher class of channel as well as licenses of UHF TV stations to VHF channels in the same community in a fashion that would offer interested parties an opportunity to apply for similar channels in the community.
—*Amendment of Part 73*
MM Docket No. 83-1148

FCC 84-358

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses.	MM Docket No. 83-1148

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1984; Released: August 16, 1984

BY THE COMMISSION:

Introduction

1. The Commission's *Notice of Proposed Rule Making* in this proceeding[1] proposed to amend the procedures whereby the Commission amends the FM and Television Tables of Assignments, Sections 73.202(b), 73.504(a), and 73.606(b), of the Commission's Rules. Specifically, the *Notice* concerned rule making proceedings in which an existing licensee[2]

[1] 48 Fed. Reg. 55585, published December 14, 1983.

[2] The terms "licensee" and "license" herein may also refer to a permittee or permit.

seeks to amend a table in order to obtain a different channel in its community while also seeking modification of its license to specify operation on the new channel. In the FM context, the requested channel is generally one of a higher class, permitting additional coverage. In the TV context, the request is generally for a lower UHF channel. In both contexts, the licensee may also seek the amendment for other reasons, such as obtaining a more advantageous transmitter site.

Background

2. Prior to 1976, the Commission had no stated policy concerning when it was appropriate to modify an existing license in the course of a rule making proceeding. Generally, the Commission granted modifications without discussion. In that year, however, the Commission ruled that it would modify the license of a petitioner requesting allotment of a higher class channel to its community to specify operation on that superior channel, provided no other interest in the proposed new channel was expressed in the course of the rule making proceeding.[3] In establishing this "Cheyenne doctrine," the Commission cited the decision of the Supreme Court in the *Ashbacker*[4] case, noting that were it to grant modification in the face of other expressions of interest, it would "effectively foreclos(e) the filing of other applications by interested parties for the newly assigned channel. . . .[5]

3. Commission action since *Cheyenne* has been consistent with the doctrine announced in that case. License modifications have been routinely granted absent other interests expressed in the course of rule making proceedings and denied in the face of such expressions. However, by delegated authority, the Commission has granted modification in the face of other interests where additional channels equivalent to proposed channels were made available. This course of action was followed recently in Helena, Montana,[6] where the Commission proposed to allot two Class C channels at that community and to modify the existing Class A licenses to specify operation on the Class C channels. Because there were two other interests in Class C channels filed in response to the *Notice* in that proceeding, the *Report and Order* allotted a total of four Class C channels and modified the licenses of the two existing Class A stations. The remaining two Class C channels were made available for application by other interested parties. The request of one of those other parties that

[3] *Cheyenne, Wyoming*, 62 F.C.C. 2d 63 (1976).

[4] *Ashbacker Radio Corp.* v. *F.C.C.*, 326 U.S. 327 (1945). The holding of that case was that a grant of one mutually exclusive application for a broadcast license without affording a hearing on the other deprives the loser of the opportunity for a hearing provided by the Communications Act.

[5] 62 F.C.C. 2d at 67.

[6] *Helena, Montana*, 50 R.R. 2d 70 (1982).

all four Class C channels be made generally available for application was rejected. However, upon review of this action, the Commission concluded that it would be more appropriate to establish a rule providing for such action through a general rule making proceeding affording the opportunity for comment on the merits of the policy.

4. In the *Notice,* the Commission indicated that it wished to continue its policy of encouraging broadcast licensees to upgrade their facilities. In light of this, the Commission suggested that, in situations such as in *Helena,* it might be proper and in accord with *Ashbacker* to amend its Rules to provide for grants of license modification. Accordingly, the *Notice* in this proceeding proposed to amend Part I of the Commission's Rules by adding a new subparagraph (g) to Section 1.420. This amendment would permit the Commission, in the course of rule making proceedings to amend the FM and Television Tables of Assignments, to modify licenses of stations, provided additional channels were made available for application by other parties expressing interests. The *Notice* also invited comments on whether it was necessary to make sufficient additional channels available for application by all parties expressing an interest or whether a lesser number of additional channels is permissible. Commenters were also asked about the implications of the proposed rule on changes evolving from Commission action in BC Docket No. 80-90.[7] Specifically, the Commission was concerned that the rule changes would create opportunities for many more upgrading possibilities than previously existed.[8]

5. Eighteen parties submitted comments in response to the *Notice,* and one party submitted reply comments. A list of the commenting parties is attached hereto as Appendix A. All commenters express support for the concept of modification of licenses of stations seeking to upgrade in the course of rule making proceedings. Among the benefits noted are (1) elimination of risks to existing stations, particularly where existing and proposed channels are incompatible, (2) speedier provision of enhanced service, and (3) more efficient use of the spectrum. Some commenters also assert that existing licensees are generally the most qualified to provide enhanced service to their communities. Several commenters, including Dempsey and Koplovitz, Fuller-Jeffrey, KAGE et al., and NRBA, argue that *Ashbacker* is no obstacle to implementation of the proposed amend-

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[7] *Modification of FM Broadcast Rules to Increase the Availability of Commercial FM Broadcast Assignments,* 94 F.C.C. 2d 152 (1983), *recon. denied,* 55 R.R. 2d 903 (1984).

[8] In the *Notice of Proposed Rule Making* in MM Docket No. 84-231 (the amendment of the table of FM allotments to add new channels made possible by BC Docket 80-90), the Commission tentatively concluded it would not accept any counterproposal for the upgrading of an existing station to a higher class of channel on the allotments under consideration in MM Docket 84-231. At the conclusion of the omnibus proceeding, however, the Commission will begin accepting upgrade proposals.

ment. Further, United asserts that the Commission has inherent power to modify licenses when to do so serves the public interest and may do so without providing the opportunity for a comparative hearing or without providing additional channels to accommodate other interested parties. Southland's comments support this view. Others, such as Bahakel, NAB, Southland, and Peoria Valley, argue that at least one alternative channel should be made available to accommodate other interests. Still other comments, such as those of Fuller-Jeffrey, KAGE et al., and Davis, support the concept of modification at the rule making stage even where no other additional channels are available. Finally, various commenters suggest alternatives or variations to the proposed amendment to the Rules as set forth in the *Notice*.

Discussion

6. The Commission has reviewed its prior decisions leading up to the *Helena* case and has examined the comments submitted in response to the instant *Notice*. We continue to believe that FM and television station licensees should be encouraged to upgrade their facilities in order to improve service to their audiences. As noted, all commenters concur in this view. We believe that adoption of the proposed amendment to our Rules comports with the mandate of *Ashbacker* and reflects sound administrative policy.

7. In *Ashbacker*, the Supreme Court interpreted Section 309(a)[9] of the Communications Act of 1934, as amended, to require that an applicant for broadcast license be granted a hearing before its application is denied.[10] In so ruling, the Court concluded that mutually exclusive applications for broadcast licenses are entitled by statute to comparative hearings before one of the applications may be granted. As noted, although the Commission recognized in *Cheyenne* that the *Ashbacker* holding applies to upgrading situations, it also recognized that its policy of granting modification to stations seeking to upgrade their facilities is not violative of the *Ashbacker* mandate in situations where no other interest in the proposed superior class of channel is expressed in comments. In deciding to grant modifications under such circumstances, the Commission determined that the public could benefit by not subjecting the licensee to needless delay and expense where no other party does, in fact, have an interest in a proposed superior channel.[11] Implicit in the rationale underlying the Cheyenne doctrine is the presumption that other interested parties have been given the opportunity to make known their interests by the filing of formal comments in the course of rule making proceedings.

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[9] The referenced language is now found in Section 309(a) and (c) of the Act.

[10] 326 U.S. at 330.

[11] 62 F.C.C. 2d at 68.

We have not been made aware of any legal impediments to a modification of license under appropriate circumstances.[12]

8. Thus, we address the issue of whether it is appropriate to modify only where sufficient other channels of the same class are available or where the number of additional channels is less than the number of other interested parties. The Commission may, by general rule, establish eligibility standards that obviate the need for individual Section 309(a) hearings before denial of a license. *U.S.* v. *Storer*, 351 U.S. 192 (1956). Establishment of such a rule here would effectively prevent applicants other than the upgrading licensee from applying for the new channel. As indicated, several commenters asserted that modification of an upgrading licensee in the course of a rule making proceeding is appropriate where as few as one additional channel is made available to accommodate other expressions of interest. NAB and Columbia further assert that the available channel can be the one being vacated. While we believe that at least one additional channel should be available to accommodate other interests, that channel must be of a class at least equivalent to the proposed channel sought by a licensee seeking to upgrade. Assuming the alternate channel provided by Commission action is equivalent to that sought by an upgrading licensee, the position of other interested parties is as favorable as if they had to compete with each other and with the upgrading licensee for the single channel initially proposed and nearly as favorable as if all applicants competed for two new channels. Moreover, the public thereby gains the benefits of a choice among alternative providers of the upgraded service. Nevertheless, as a matter of policy, where more than one additional interest is timely filed, the Commission will attempt to allot as many additional equivalent channels as there are interested parties.

9. Amendment of the Rules to encourage upgrading and improved service by broadcast licensees is also consistent with our previous practice as well as with our recent action in BC Docket No. 80-90.[13] Commission policy favors enhanced service from existing licensees. This was manifest in our *Cheyenne* decision and in our actions since *Cheyenne*. We have consistently sought to provide additional channels to accommodate other expressions of interest, thereby permitting modifications without the costs and risks associated with the application process. However, where additional channels could not be provided, we permit petitioning licensees to withdraw their rule making proposals where the existing and proposed

[12] Any parties who object to the modification for other reasons could also file comments during this period. *See* 47 U.S.C. §309(b), (c), (d).

[13] *Report and Order*, 94 F.C.C. 2d 152 (1983). *Memorandum Opinion and Order*, 49 Fed. Reg. 10260, published March 20, 1984.

allotments were incompatible.[14] In Docket No. 80-90, we amended the Rules to provide additional service to satisfy a "substantial demand" for new FM service by establishing three new classes of station.[15] We also reiterated in that proceeding our determination to encourage improvement of facilities by existing FM stations. In that regard, we specifically noted that creating intermediate classes of stations serving larger areas than Class A stations represented "major benefits" in terms of spectrum efficiency.[16] Conversely, we also recognized that to continue to allow existing stations to operate at less than authorized facilities would preclude additional service to the public.[17] Other actions in that proceeding were consistent with and reflective of our policy of encouraging upgrades. For instance, aside from creating new classes of station, we established "buffer zones" for three years during which time licensees of existing Class C stations are protected from new allotments which would otherwise limit their ability to increase their power to authorized levels. We also gave existing stations up to three years in which to improve their facilities to the minima for their classes, allowed them to protect their classifications simply by filing applications to upgrade their facilities, and designated such changes as minor.

10. The considerations underlying our policy of encouraging existing FM licensees to upgrade is also applicable regarding television licensees. Accordingly, in situations where UHF licensees request allotments of VHF channels to their communities, we will attempt to provide additional VHF channels to accommodate other expressions of interest in such channels and thereby permit modification of petitioners' licenses during rule making proceedings. However, we are aware that this procedure will rarely be applied since there are few locations where an additional VHF channel can be allotted. More common is the situation where a lower UHF channel is requested. We do not consider the differences between higher and lower numbered UHF channels significant[18] and therefore will not treat requests for modification to lower numbered UHF channels as upgrading situations. Rather should the requested UHF be allotted, it would be available for application by all interested parties. Similarly, we are aware of no public interest benefits which would impel us to treat requests for modification from one VHF channel in a community to another as upgrading requests to which the instant proposed amendment

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[14] See *Statesboro, Georgia*, 40 R.R. 2d 1021 (1977); *Morgan City, Louisiana*, 48 Fed. Reg. 4845, published February 2, 1983 and *Ft. Smith, Arkansas*, and *Poteau, Oklahoma*, 47 Fed. Reg. 23189, published May 27, 1982.

[15] 94 F.C.C. 2d at 170.

[16] *Id.* at 173.

[17] *Id.* at 176.

[18] See *Houston, Texas*, 50 R.R. 2d 1420 (1982).

to the Rules would apply. Finally, this rule would not apply to AM stations since there is no table of allotments for the AM service.

11. We turn now to comments suggesting alternatives to the proposal as set forth in the *Notice*, some of which lie outside the scope of the *Notice*. Awarding a preference to licensees seeking to upgrade in the comparative hearing context as proposed by Jones and NRBA, is a matter exceeding the scope of the proposed amendment to the Rules. Nor is the proposed amendment intended to correct our "erroneous" approach of not allowing for modifications where television or FM licensees seek to relocate within a market while retaining their existing channels as suggested by Corinthian/Belo and supported by Southland. Scripps-Howard's suggestion to prohibit competing applications where channels are exchanged within a market is likewise outside the scope of the *Notice*.

12. Certain other proposals submitted in response to the *Notice* are also outside its scope. The proposed amendment was not meant to encompass situations where non-licensee petitioners seek to operate new facilities on requested new channel allotments as proposed by Bahakel. Similarly, we did not intend in this proceeding to modify any licensee seeking to change facilities consistent with technical requirements as suggested by Southland. The matter of intermixture is clearly outside the scope of this proceeding, and we will not grant Paradise's request to reexamine that issue at this time. The suggestion by Fuller-Jeffrey, KAGE et al., and Southland to delay issuance of the omnibus *Notice* in Docket No. 84-231 pending a determination in this proceeding has been rendered moot by the previous release of that omnibus *Notice* on March 14, 1984. Additionally, amendment of our Rules pertaining to terrain shielding and directional antennas as well as allowing Class A stations to operate at greater heights above average terrain and at greater power limitations where separation requirements exceed Class A minima as proposed by Paradise lies beyond the scope of this proceeding. The suggestion of Dempsey and Koplovitz concerning a switch of a reserved noncommercial educational channel with a commercial channel in the same community is, again, a matter which is outside the scope of this proceeding. Finally, alleged inequities in the FM Table of Assignments which, according to Columbia, can be remedied by Commission action in Docket No. 80-90 are not subject to action in this proceeding.

Conclusion

13. Commission policy encourages FM and television licensees to upgrade their facilities. Upgrading enables these licensees to provide better service to their audiences without the cost and delay of a comparative hearing. We believe that, by amending the Commission's Rules to provide a procedure whereby licensees of stations seeking to upgrade can do so within the context of the rule making proceeding to

amend the FM and television tables of assignments, we will encourage upgrading. This is so, because modification at that time will reduce costs and risks associated with comparative consideration of competing applications. We further believe that this procedure will reduce burdens on Commission resources. Because the new procedure would allow additional equivalent channels to be made available to accommodate other parties expressing interest, separate rule making proceedings to assign the channels are unnecessary. Also unnecessary would be the administrative burden of processing applications and conducting comparative hearings in these situations. In summary, as expressed in the attached Appendix B, the new rule would permit the modification of an existing licensee seeking to upgrade so long as at least one additional equivalent channel is allotted for other interested parties.

14. Pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. Section 604, a final regulatory flexibility analysis has been prepared and is attached hereto as Appendix C.

15. Accordingly, IT IS ORDERED, That, Part 1 of the Commission's Rules and Regulations IS AMENDED, effective September 24, 1984, as set forth in Appendix B.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. Authority for the actions taken herein is contained in Sections 4(i) and 303(g) and (r) of the Communications Act of 1934, as amended.

18. For further information concerning this proceeding, contact Joel Rosenberg, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A - may be seen in FCC Dockets Branch, 1919 M Street, N.W. Washington, D.C.

Appendix B

47 C.F.R. 1.420 is amended by adding new paragraph (g) to read as follows:

§1.420 Additional Procedures in Proceedings for Amendment of the FM, Television or Air-Ground Table of Assignments.

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(g) In response to a Petition for Rule Making to amend Section 73.202(b), Section 73.504(a), or Section 73.606(b) filed by a licensee (or permittee) of an FM station to allot another class of FM channel to its community of license or by a licensee (or permittee) of a UHF television broadcast station to allot a VHF television channel to its community of license and upon a determination that the public interest would be served thereby, the Commission may modify the license (or permit) of the petitioner to specify operation on the newly allotted channel. Provided, that the Commission shall not modify the license (or permit) of the existing station

where, in the course of the rule making proceeding, another party or parties has expressed an interest in the proposed channel and where there is not at least one additional equivalent or superior channel available for allotment.

Appendix C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. *Need for and Purpose of the Rule*

This action was prompted by the Commission's desire to encourage its FM and television licensees to upgrade their facilities and thereby improve service to the public. Application of current Commission policy providing for modification, in the course of rule making proceedings amending the FM and television tables of assignment, of the licenses of stations seeking to upgrade is limited to situations where no other interests in the proposed channels are expressed in the course of those proceedings. The rule adopted herein, by providing for modification where additional channels of a class at least equivalent to the proposed channels are made available to accommodate those other expressions of interest, will encourage licensees to initiate rule making proceedings to allot superior channels to their communities. This is so, because the instances where comparative hearings to resolve competing applications are mandated will be decreased. Other important benefits will be realized as a result of this new procedure. First, licensees will be able to institute service on new superior channels much more quickly and with less expense than if they were required to submit applications for authorization to operate on the new channels. Second, the administrative burden of processing unnecessary applications and of further rule making proceedings for additional channel allotments would be eliminated. Further, litigation expenses associated with license applications and with further rule making proceedings would be avoided.

II. *Flexibility Issues Raised in the Comments*

No issues were raised specifically in response to the initial regulatory flexibility analysis. In general, the commenters asserted that existing Commission policy restricting modification of licenses of stations seeking to upgrade to superior classes of channels to situations where no other interests in the proposed channels are expressed in the course of rule making proceedings does not provide sufficient incentive to seek upgrade. The Commission agrees with these assertions and, accordingly, adopts a rule providing for modification in such situations, provided at least one additional channel at least equivalent in class to the proposed channel is available to accommodate other expressions of interest. Some commenters suggested that the Commission's Rules be amended to provide for modification in circumstances involving license changes other than upgrading or where no additional channels need be available. The Commission disagrees, because these suggestions are either outside the scope of the instant proceeding or are legally insufficient, respectively.

III. *Significant Alternatives Considered and Rejected*

Some commenters suggested that the Commission's Rules be amended to provide for modification in circumstances involving license changes other than upgrading proposals. These alternatives were not considered because they concerned situations which were outside the scope of this proceeding. No significant alternatives were rejected.

Instructional Television Fixed Service
Rules, Amendment of
Technical Requirements

Report and Order adopted amending certain technical and non-technical rules regarding Instructional TV Fixed Service (ITFS). These changes will provide ITFS licensees with additional operational flexibility. In addition, certain administrative burdens are eliminated by simplifying licensing procedure and extending license term.
—*Amendment of Part 74*
MM Docket No. 83-523

FCC 84-362

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service	MM Docket No. 83-523 RM-2954 RM-2603 RM 2609 RM-3057

REPORT AND ORDER

Adopted: July 26, 1984; Released: August 13, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

Introduction

1. In this *Report and Order*, we are amending certain technical and non-technical rules regarding the Instructional Television Fixed Service (ITFS). These changes will provide ITFS licensees with additional operational flexibility by relaxing certain transmission standards, permitting temporary fixed operations and authorizing ITFS service to cable headends. In addition, this action will eliminate certain administrative burdens by simplifying the licensing procedure and extending the license term for ITFS stations from five to ten years.

Background

2. On May 26, 1983, the Commission adopted a *Notice of Proposed Rule Making (Notice)* in the above captioned matter.[1] The *Notice* indicated that the current ITFS rules may be unnecessarily restricting the activities of ITFS licensees and may be causing inefficient spectrum utilization. Accordingly, the Commission proposed a number of changes in the technical and non-technical ITFS rules. In the technical area, these proposed changes included: (1) relaxing the current transmission standards imposed on ITFS stations; (2) authorizing the use of temporary fixed stations; and, (3) permitting delivery of ITFS programming to cable headends. In addition, although not specifically proposed as a rule change, the Commission sought comment on allowing wideband ITFS transmissions. The non-technical changes proposed were: (1) modifying the current four channel assignment limitation; (2) relying on prior frequency coordination to prevent frequency interference; (3) instituting a one-step licensing process and (4) increasing the licensing term from five years to ten years.[2] A total of 14 parties filed comments in response to these proposals.[3]

3. In a *Report and Order* in General Docket No. 80-112, the Commission reallocated a portion of the ITFS spectrum to the Multipoint

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[1] *See Notice of Proposed Rule Making*, MM Docket No. 83-523, 48 FR 29553 (June 27, 1983).

[2] The proposed changes listed in the *Notice* were, in part, the result of a number of petitions for rule making filed before the Commission. These petitions include: Center for Excellence, Inc. petition (RM-2954) to permit operation of "movable fixed" or "temporary fixed" stations; Kessler and Wilhelm petition (RM 2609) to permit the delivery of instructional and cultural material to Community Antenna Television (CATV) systems for subsequent distribution to schools within the cable franchise area; Kessler and Wilhelm petition (RM-2603) to permit implementation of more economical ITFS systems and to allow ITFS licensees the choice of technical standards more appropriate to their instructional goals; Eastern New Mexico University petition (RM-3057) to amend ITFS frequency assignments to permit point-to-point FM transmission across sparsely populated areas. In a separate docket (General Docket No. 83-322) the Commission addresses an ITFS related petition filed by the Board of Trustees, The California State University and Colleges for San Diego State University (RM-3292) to amend the licensed operator requirements for ITFS stations.

[3] The commenting parties include: The Boston Catholic Television Center, Inc.; Arizona State University; San Diego County Office of Education; The Public Broadcasting Service; The Southern California Instructional Television Fixed Service Advisory Committee; The George Washington University; The National Cable Television Association, Inc.; University of Louisville, Belknap Campus; Illinois Institute of Technology; The Association for Higher Education of North Texas; The Catholic Television Network; Joint Comments of Connecticut Educational Telecommunications Corporation, University of Houston, Nebraska Educational Television Commission, University of Nebraska, South Carolina Educational Television Commission; The Diocese of San Diego; and Contemporary Communications Corporation.

Distribution Service (MDS) and permitted ITFS licensees to lease their excess channel capacity.[4] That action has increased the public's interest in ITFS. Therefore, in addition to this *Report and Order*, the Commission will consider a companion *Further Notice of Proposed Rule Making (Further Notice)* in this proceeding. The *Further Notice* focuses attention on issues not fully explored in the earlier *Notice* and that have arisen from the changed circumstances that have occurred as a result of our actions in Docket No. 80-112. The *Further Notice* will address a number of issues, such as the nature and scope of permissible ITFS service, ITFS eligibility requirements, interference criteria and the resolution of mutually exclusive applications.

Technical Issues

4. *Transmission Standards.* Although ITFS transmitting equipment operates with very low power and has a useful operating range of only about 20 miles, the existing rules require that ITFS stations meet transmission standards closely paralleling those of full power television broadcast stations. The Commission, in the *Notice*, observed that these rules preclude ITFS licensees from using a wide variety of lower cost television origination and recording equipment satisfactory for instructional television purposes but not in conformance with certain broadcast transmission standards. In addition, the rules preclude the use of other video formats more appropriate to the material being transmitted.[5] Accordingly, the *Notice* proposed relaxing the current rules concerning transmission standards imposed on ITFS operations. The proposed rule changes would let the quality of ITFS service be determined by the needs or demands of the licensee rather than by Commission dictate.

5. The commenting parties generally favor relaxing Commission rules governing ITFS transmission standards.[6] Some parties, however, caution

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[4] *See Report and Order*, General Docket No. 80-112, 48 FR 33873 (July 26, 1983). Also, *See Memorandum Opinion and Order on Reconsideration* in General Docket No. 80-112, FCC 84-177, released June 5, 1984.

[5] In this regard, the Commission has received a petition for rule making (RM-2603) from the engineering firm of Kesseler and Wilhelm requesting permission to use non-standard color encoding schemes to meet certain specialized ITFS needs, such as the transmission of medical programs. In addition, the Commission has granted waivers to the Anaheim City School District to use the SECAM/60 color system and to several Florida ITFS systems to operate non-broadcast standard equipment. This experience has proven to be cost-efficient to the ITFS licensee and has not resulted in interference to the transmissions of other stations.

[6] Parties favoring the relaxation of technical transmission standards include: the Association for Higher Education of North Texas (AHE); the Boston Catholic Television Center (BCTC); the Catholic Television Network (CTN); the Diocese of San Diego (DSD); the University of Louisville and, the Joint Comments of Connecticut Educational Telecommunications Corporation, University of Houston, Nebraska Educational Television Commis-

that the relaxation of current transmission standards must not be done in such a manner as to denigrate the integrity of ITFS channels. Further, they indicate that such changes must not preclude continued transmission of television broadcast quality signals by those ITFS licensees wishing to do so. For example, Arizona State University (ASU), although generally favoring the relaxing of transmission standards, encourages the Commission to retain specific minimum standards. George Washington University (GWU) proposes that any change in transmission standards should provide that, at a minimum, existing frequency tolerance and spurious emission standards must be met in order to provide licensees with adequate interference protection. Contemporary Communications Corporation (CCC) supports the proposed relaxation of ITFS technical standards, provided that they are compatible with the overall engineering policy being developed in General Docket No. 80-113.[7] CCC suggests that the Commission bear in mind that MDS, ITFS and the private Operational Fixed Service (OFS) are related services which share the 2500-2690 MHz band.

6. After reviewing the record on this matter, we are persuaded that ITFS operators should not be restricted to NTSC format or broadcast quality video signals when other video standards may be better suited to their needs. We believe that the costs imposed on school districts and other educational and nonprofit institutions to meet the technical transmission standards for ITFS are counterproductive to the development of ITFS systems. Since adopting technical standards for ITFS transmissions in 1963, technological changes have occurred in television origination and recording equipment. These changes would allow ITFS licensees to use equipment that is more cost-effective or appropriate to their specific needs if our rules governing transmission standards are changed. For these reasons, we are amending our rules to relax the technical standards for ITFS transmissions.

7. In making this decision, we intend that stations not experience increased interference as a result of our actions. Therefore, we will permit any type of video signal format so long as the transmitter is type-accepted for the particular modulation to be used and complies with the emission requirements set forth in Section 74.936 of the Commission's rules.[8] Thus,

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sion, University of Nebraska and South Carolina Educational Television Commission (Joint Commenters).

[7] 45 FR 29350 (May, 2 1980).

[8] Recently, the Commission amended its rules to permit the television aural baseband to be used for stereophonic sound, second language programming and any other broadcast or non-broadcast use. In order to accommodate these additional signals, the maximum permissible aural deviation level was increased from ±25 kHz to ±75 kHz. *See Second Report and Order* in Docket No. 21323, 49 FR 18100 (April 27, 1984). We are amending the ITFS rules to allow increase deviation in conformance with our actions in Docket No.

we will remove the financial burden of having to meet broadcast quality transmission standards. Further, we believe that this action will create greater flexibility for ITFS licensees to meet the needs of their users and will foster the development of ITFS systems, but it will not increase objectionable interference.

8. *Temporary Fixed Stations.* In the *Notice*, the Commission proposed that ITFS systems be authorized to use temporary fixed transmitters that could be transported to any number of locations for the purpose of transmitting picture and sound information back into the ITFS system. The Commission indicated in the *Notice* that temporary fixed operation would increase the flexibility and scope of ITFS use and would enable the ITFS operator "to make available to many participants the unique advantages of interactive instruction."[9] In this regard, the *Notice* proposed to allow the filing of applications for temporary fixed stations on a secondary basis, as the spectrum space allows. Additionally, we proposed that any of the licensed ITFS channels may be used on a temporary fixed basis, but only in the geographic area covered by the ITFS license.

9. Our proposal to permit temporary fixed ITFS operation received a variety of comments. BCTC states that temporary fixed stations will be difficult to operate in an effective and efficient manner without impacting on other ITFS users, and suggests that a solution would be to authorize such temporary operations in the TV broadcast auxiliary service. ASU approves of the proposals regarding temporary fixed stations, but cautions the Commission about possible interference problems with existing licensees and users. PBS favors the operation at temporary fixed locations, provided such operations do not preclude the establishment of stations at permanent locations. The Southern California ITFS Advisory Committee (SC Advisory Committee), San Diego County Office of Education (SDCOE), CTN, Joint Commenters, and DSD support the proposal for temporary fixed stations on a secondary basis. The University of Louisville (U of L) also favoring the proposal for temporary fixed stations, argues that these temporary stations should be allowed to transmit directly to receiver locations and that the use of temporary fixed, non-licensed receiving locations should be authorized in this proceeding.

21323. Accordingly, ITFS licensees will be permitted to provide subcarrier services; however, transmitters must be type accepted and designed for subcarrier operation without electrical or mechanical alterations to the exciter or other transmitter circuits.

[9] The *Notice* also indicated that waivers to permit the operation of "movable fixed" and "temporary fixed" ITFS stations have been granted to a number of entities. The waivers granted allow these licensees to transmit programming such as "live" governmental meetings to lawyers who deal with such bodies on a regular basis; doctor rounds from hospitals for instruction of nurses; and teleconferences.

10. We are aware of the value of temporary fixed stations to ITFS licensees' operations. By permitting these stations, we would add a new dimension to ITFS and allow for programming not easily originated from the studio. Such service would also enhance the services provided by ITFS operators. Nevertheless, we remain concerned about the impact that these operations would have on conventional ITFS operations. Therefore, while we are modifying our rules to permit the operation of temporary fixed stations, such use will be on a strict secondary basis.[10] Furthermore, operation of temporary fixed stations must be limited to the geographic area of the ITFS licensee and must be coordinated with other licensees in the same area. Temporary fixed operations will also be permitted on channels already assigned to ITFS licensees, provided that such operations do not cause more interference than the primary ITFS authorization. The use of one or more additional transmitters for temporary fixed stations will come under the authorization granted by the ITFS license. If the need for point-to-multipoint transmission grows in a given area, secondary temporary fixed stations will have to give way to primary ITFS operation. Secondary stations may be required to change channels, bands or even discontinue operation in order to protect primary authorizations.

11. *Delivery of ITFS Programming to Cable Headends.* In the *Notice*, the Commission proposed to permit the delivery of ITFS programming to cable headends for subsequent distribution to schools and other institutions within the cable franchise area. In making this proposal, the Commission noted that, if ITFS programs could be fed to cable headends, ITFS signals could be delivered to schools without line-of-sight transmission paths.[11] The Commission also noted that allowing ITFS signals to be sent to cable headends would make it feasible to link adjacent communities through the cable system so that expense of the ITFS system could be shared among school districts. In addition, the Commission stated that permitting ITFS signals to be transmitted via cable systems could improve the signal quality of ITFS reception to end-users. Finally, the *Notice* indicated that such action would be consistent with the Commission's goal of establishing ITFS as a low-cost alternative to the use of UHF and VHF television stations for the transmission of instructional programming to schools.

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[10] It should be noted that operation of temporary fixed ITFS stations within 35 miles of the U.S.-Canadian border may be precluded by Canadian use of some or all of the channels. At this time, no restrictions exist for operation along the U.S.-Mexican border.

[11] In this regard, we have granted waivers to permit operating ITFS stations to specify cable headends as receive sites in circumstances where the waiver permitted expansion of the ITFS service to schools unable, for a variety of reasons, to receive the signal by traditional line-of-sight transmission. The School Board of Broward County, Florida, was granted such an authorization on October 29, 1979, by letter from Broadcast Facilities Division.

12. All commenting parties, including the National Cable Televison Association (NCTA), favor permitting delivery of ITFS programming to cable systems. In addition, BCTC states that the Commission should permit ITFS programming to be delivered to homes wired for cable. BCTC, SDCOE and CTN also suggest allowing ITFS programming to be delivered by other means of distribution such as Multipoint Distribution Services (MDS). PBS, GWU, and DSD also encourage the FCC to permit ITFS channels to be used for studio transmitter link (STL) and studio-headend links (SHL) to deliver programs to cable headends on a secondary basis.

13. After reviewing the record in this proceeding, we believe that a number of benefits will accrue from permitting the delivery of ITFS programming to cable headends for subsequent distribution within the cable system. We recognize that certain economies will be realized by this action. Receiving systems would not have to be installed at each ITFS receiving location, thereby eliminating the cost of constructing and maintaining ITFS receiving antenna towers. The need for line-of-sight transmission paths from an ITFS station would no longer exist. Furthermore, allowing ITFS signals to be delivered by cable would also improve the signal quality of ITFS reception. The quality of the signal would be more uniform and less susceptible to disturbances due to meteorological conditions. In addition, since cable system headends typically have high reception towers, ITFS stations may be able to transmit their signals to headends farther away than through direct transmission to the receive locations. Accordingly, any ITFS applicant that lists only cable headends as its specified receive locations, will be required to show that one use of the cable system will be to distribute educational and instructional programming to schools and other appropriate ITFS users.

14. By this *Report and Order*, we are also permitting the use of ITFS frequencies for studio-transmitter link (STL) operation on a secondary basis. An ITFS licensee's origination equipment and studio may be distant from a desirable location from which to transmit the ITFS signal. In this situation ITFS licensees will be permitted to use ITFS frequencies for STLs on a secondary basis to deliver programming to the primary ITFS transmitter. Such operation would be required to conform to the same requirements set forth previously for temporary fixed stations. Specifically, they would be permitted only within the geographical area of the ITFS licensee, must be coordinated with other licensees in the same area and would be on a strict secondary (not-to-interfere) basis.

15. *Wideband ITFS Transmissions.* In the *Notice*, the Commission also sought comment on a petition for rule making (RM-3057) filed by Eastern New Mexico University to allow the combination of three contiguous ITFS channels for wideband ITFS transmissions. Such trans-

missions would use a frequency modulated video carrier to provide long-haul, point-to-point communications over sparsely populated areas.[12]

16. BCTC, in its comments, states that wideband transmissions should be permitted on a secondary basis for point-to-point purposes in sparsely populated areas. ASU and SDCOE also support the use of wideband transmissions. The SC Advisory Committee and CTN believe that such authorization should be granted on a case-by-case waiver basis.

17. After reviewing the comments on this issue, we believe that such use of ITFS frequencies is inappropriate. A scheme that would allow several channels to be used for transmitting only one signal would decrease the number of channels available for ITFS use. As stated in the *Notice*, we believe that spectrum is available elsewhere for such wideband transmissions, and that other services such as the private operational fixed service should be used to provide long-haul communications needs. Such authorization would require the creation of a different set of technical standards and a second category of accepted equipment for this band. Nevertheless, we are aware of the needs of ITFS licensees and will continue to consider waivers on a case-by-case basis, especially where the applicant, such as Eastern New Mexico University, requires wideband capabilities and where frequency congestion is not a problem.

Non-Technical Issues

18. *Four-Channel Assignment Limit.* The *Notice* proposed relaxing the current ITFS four-channel assignment limitation. Several parties endorse this proposal. BCTC, ASU, SDCOE, SC Advisory Committee, AHE, and Joint Commenters all support removing the four-channel assignment limitation. Although CTN and DSD generally support removal of the current assignment limitation, they argue that applicants requesting more than four channels should be required to demonstrate that they intend to use the additional channels for instructional purposes and that no one licensee should have the majority of available frequencies.

19. Section 74.902(c) of the Rules precludes assignment of more than one channel group (four channels) to the same licensee for use within a single area of operation. In the past, the Commission has waived this rule in areas where a need has been shown. While commenting parties favor the elimination of this rule, they recommend that requests for additional channels be accompanied with a description of how these channels will be used. There has been a significant increase in recent applications filed for ITFS stations and in the demand for channels in certain areas. In addition, we anticipate a further increase in ITFS applications as our deregulatory

[12] The use of frequency modulation would provide higher quality and longer range communications but would require approximately three times the spectrum of traditional amplitude modulated ITFS transmissions.

actions take hold. Therefore, we are not amending our rules to relax the four-channel assignment limitation. ITFS applicants and licensees seeking more than one channel group will be required to submit a showing in support of a request for waiver of the rule. Such requests must include a complete description of how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs. The waiver burden will be exceedingly high particularly in areas where a large demand for channels exists.

20. *Frequency Coordination.* The Commission stated in the *Notice,* that "in order to avoid frequency conflicts and to facilitate new entry into already congested areas ... we will assume that, prior to filing their applications, ITFS applicants have coordinated the technical aspects of their proposals with existing channel users and other relevant licensees." In this regard, the *Notice* indicated our belief that (based on past experience with point-to-point microwave services) nearly all potential frequency conflicts can be resolved through the use of prior frequency coordination. The *Notice* also requested comment on how to resolve disputes that might arise if two or more mutually exclusive applicants wish to use a specific channel at the same time. For example, the *Notice* asked whether the Commission's licensing priority should be based on a first-come, first-serve basis, a lottery selection technique or some other method.

21. Comments on prior frequency coordination were mixed. Some parties requested that the Commission establish minimum protected contours and specify interference standards for existing stations. Other parties requested that the status quo be maintained and let frequency coordination be accomplished at the local level. BCTC and SDCOE support the prior frequency coordination by new ITFS applicants. ASU believes that the Commission should establish minimum protected contours for existing stations. PBS argues that the Commission's reliance on prior frequency coordination is a serious mistake. PBS claims that prior coordination seriously burdens ITFS applicants by requiring every existing licensee and permittee to retain sufficient engineering expertise to evaluate every new application filed in its service area. PBS urges the Commission to continue to evaluate the interference potential of ITFS applicants and to reject those predicted to cause interference. The Commission, according to PBS, could also specify a set of standards for the interference showings applicants must meet and simply evaluate the showing against the standards. The Joint Commenters also recommend the adoption of protected contours and interference ratios. DSD agrees with the process of coordinating frequencies at the local level but believes that the Commission should review the results and serve as final arbiter.

The SC Advisory Committee, GWU, AHE, and CTN all support frequency coordination at the local level.

22. The growth in the ITFS service as a result of this and previous proceedings has increased the number of mutually exclusive applicants. The *Notice* requested comments on how we should resolve any disputes that might arise if two or more mutually exclusive applicants wish to use a specific channel at the same time. We also asked if we should establish protected contours, interference ratios, or allow the users to resolve any problems that may arise by mutual agreement. In view of the increased interest in ITFS as a result of our actions, we will seek additional comments on these issues in the companion *Further Notice*. Accordingly, we will not address the issue of how to resolve mutually exclusive situations in this *Report and Order*.

23. In the interim, we will continue to assume that prior to filing ITFS applications, the applicants have coordinated the technical aspects of their proposal with existing channel users and other relevant licensees and will continue to process ITFS applications on their merits. To facilitate the needed engineering studies for new applicants, Commission records on existing licensees or pending applicants will be made available for examination.

24. *One-Step Licensing*. In the *Notice*, the Commission proposed a one-step licensing process for ITFS applicants. With this one-step licensing process, the Commission issues a single ITFS station license.[13] There is, however, an implied construction permit for the period of one year in the grant. If construction is not completed within that one-year period, the license is invalid and will be deleted from the Commission's records, assuming there is no request for an extension of time. The *Notice* requested comment on this approach.

25. All parties commenting on this proposal favor a one-step licensing process. However, two parties provided qualifying language. The University of Illinois (U of I) believes that one year is too short a time period after the grant of a license to complete construction since the budgeting and scheduling processes in academic institutions are generally complex and lengthy. PBS suggests the Commission issue construction permits on a form with a tear-off portion which the licensee must sign and return when the station is ready for operation. According to PBS, this would be a one-step process that would allow the Commission to keep a record of ITFS stations actually operating.

[13] Previously, the Commission granted both a construction permit giving permission to build the ITFS facilities and a subsequent station license authorizing the operation of the ITFS station.

26. We believe that one-step licensing is appropriate for ITFS applicants.[14] Currently, we use one-step licensing for remote pickups, aural studio-to-transmitter links, intercity relays, and TV auxiliaries. This process has proved beneficial in reducing the administrative burden on both the Commission and licensees. Similarly, we believe that ITFS will benefit from such a simplification of the licensing process. In addition, we agree that a one year construction requirement may pose unreasonable burdens on ITFS licensees. We recognize that the budgeting and scheduling processes for educational institutions could delay the construction of ITFS facilities beyond the one year period. Accordingly, we are adopting a requirement that construction of the facility be completed within 18 months of the grant of the license. ITFS licensees are cautioned, however, that we are concerned that construction of facilities be initiated and completed in a timely manner. This is especially true given the fact that other entities, willing to proceed in a timely manner, may be precluded from using these frequencies.

27. In this *Report and Order*, we are amending our rules to permit one-step licensing for ITFS stations. However, if construction is not completed within 18 months and if there has been no request for an extension of time to complete construction, then the ITFS station license will be subject to automatic cancellation and the frequencies will be issued in the normal process to other applicants. We believe this decision will provide for maximum utilization of ITFS frequencies and will expedite our licensing process.

28. *Extension of the ITFS License Term.* The *Notice* proposed extending the ITFS license term from the current five years to ten years. The Notice also contained a proposal to amend the rules by requiring that, if a licensee has not operated its ITFS station for a given period of time, the license will be forfeited. We invited comments on whether a one year non-operation period is an appropriate time frame before requiring forfeiture of the license. Additionally, we requested comment on including a requirement that the station must receive "substantial use" to avoid license forfeiture.

29. An overwhelming majority of the commenting parties favor the proposed 10-year license term. Comments varied, however, on the issue of forfeiting ITFS licenses for those stations either not operated for one year or not deemed to receive "substantial use". SDCOE supports the proposal that unused ITFS licenses be forfeited, but recommends that the period of non-use before forfeiture occurs be two years. The longer period would account for academic calendars and budgeting processes that may impact on ITFS station operations. BCTC believes a clear distinction should be

[14] The Communications Amendments Act of 1982 (Public Law No. 96-254) amended the Communications Act of 1934 so that construction permits are no longer required.

made between non-use by ITFS entities which have never constructed and activated their authorized facilities and those which have constructed and/or activated their stations. The SC Advisory Committee urges the Commission to make some effort to define a procedure that would make "substantial use" a condition for retention of the license. They suggest an annual report to the Commission indicating the number of hours per channel that the station is in operation. U of L proposes that if non-operation occurs, through no fault of the licensee, and is expected to extend past one year, the licensee may obtain an extension of time upon informal application to the Commission. DSD argues that a requirement of "substantial use" should include some definition of the number of hours per channel the station would have to be operating. DSD also believes the Commission should determine a time schedule for taking action against an under-utilized station and include a probationary period to restore the station to the minimum standard of substantial use.

30. Two parties AHE and CTN, oppose the rule change. AHE would support a requirement that the licensee of any ITFS channel not in operation for more than one year submit a statement to the Commission showing good cause for non-operation and advising the Commission as to when the station will be operational. Regarding "substantial use," AHE believes that since the needs of individual ITFS systems vary greatly and imposing a strict definition of "substantial use" would be unfair to many licensees. AHE also believes that any problem of "substantial use" of ITFS channels should be largely alleviated by the Commission's *Order* in General Docket No. 80-112, that allows ITFS licensees to lease excess capacity on licensed channels. CTN believes that forfeiture of an ITFS license in the event of a one-year period of non-use is too harsh and, like AHE, favors allowing the licensee to explain why the channel has not been used during the one year period.

31. The Communications Amendments Act of 1982 allows us the opportunity to extend the ITFS license term to ten years. All commenting parties favored the lengthened license period and we are changing our rules accordingly.

32. We are not inclined to establish a "substantial use" standard at this time.[15] We believe the action in Docket No. 80-112 and our further

[15] The *Report and Order* in Docket No. 80-112 indicated that we cannot anticipate how much time is required for each ITFS licensee to meet its needs. *See* 48 FR 33873 (July 26, 1983) at para. 118. In the *Memorandum, Opinion and Order on Reconsideration* in General Docket No. 80-112 the Commission, upon reconsideration, established an interim requirement that during the school year, an ITFS licensee must provide 15 hours of ITFS programming per channel between the hours of 8 A.M. and 10 P.M. on Monday through Friday before being allowed to lease excess ITFS capacity. *See Memorandum Opinion and Order on Reconstruction* in General Docket No. 80-112, FCC 84-177, released June 5, 1984.

consideration of this matter in the *Further Notice* will assure sufficient programming on ITFS systems. Nevertheless, if an ITFS channel remains unused for more than one year, the authority to operate on such channel(s) will be forfeited and the frequency or frequencies will be available to other applicants. We believe that a one year period is reasonable to allow ITFS licensees sufficient time to remedy the non-use situation and to accommodate our responsibilities to ensure efficient spectrum usage.

Summary

33. In summary, we believe that the technical and non-technical rule changes adopted in this *Report and Order* will increase the viability of the ITFS service, allow for reasonable technical experimentation by ITFS licensees, and encourage more efficient utilization of the ITFS spectrum. In addition, these changes will permit ITFS operators greater flexibility to develop and offer services that specifically address their needs. Accordingly, we shall amend our rules to (1) relax technical transmission standards; (2) permit the operation of temporary fixed stations; (3) permit the delivery of ITFS programming to cable systems; (4) implement a one-step licensing process; and (5) lengthen the license term to ten years.

34. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and Purpose of the Rules.

The Commission has concluded that permitting the operation of temporary fixed stations; permitting the delivery of ITFS programming to cable systems; implementing a one-step licensing process; and lengthening the ITFS license term to ten years would enhance efficient use of ITFS and reduce the costs associated with ITFS operation, thereby improving ITFS's viability to provide services to its users. Our rule changes will create a less restrictive environment and allow ITFS licensees to more readily adapt their operations to their programming needs.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues raised.

No issues or concerns were raised specifically in response to the initial regulatory flexibility analysis. The issue of relaxing technical transmission standards, authorizing temporary fixed stations and allowing ITFS programming to be delivered to cable systems received favorable reactions. Some parties expressed concern that relaxing technical transmission standards may present some interference problems. However, most

parties agree that if interference problems emerge they could be resolved at the local level.

The non-technical rule changes also received a generally favorable response. Commenters favored relaxing the four-channel assignment limitation, but felt that a description of proposed channel use should accompany requests for more than four-channels. Commenters also favor maintaining frequency coordination at the local level, but expressed concern that increased demand for ITFS would make frequency coordination at the local level more difficult. At some point, according to the commenters, the Commission might have to establish protective contours and interference ratios as a means of resolving interference problems. All parties oppose the use of lotteries. Most commenters would favor a paper comparative hearing. Finally, all commenters favored both the one-step licensing process and the ten-year license term, but they expressed concern that the one-year period required to complete construction is too short for academic institutions. The commenters opposed the "substantial use" standard to determine if a license should be forfeited.

B. Assessment

The Commission views the absence of specific claims of adverse impact with respect to its ITFS proposals as indicative of their lack of potential for negative effects on small businesses.

Information submitted before the Commission suggests that in metropolitan areas with extensive ITFS operations, frequency coordination among ITFS users may become difficult to accomplish. Where coordination is not effective, interference could occur among ITFS operators and with other licensees in the area. It appears that such situations will be limited and that local coordination is preferred. However, a *Further Notice of Proposed Rule Making* will address the issue of frequency coordination, including the possibility of establishing protection contours and carrier-to-interference ratios. In some isolated cases, the concerned parties may request the Commission to resolve interference problems.

C. Changes made as a result of such comments.

As a result of the comments, we are permitting an 18 month period to complete construction of an ITFS system after being granted a license. This will permit the academic budgeting process sufficient time to allocate resources to ITFS construction. Finally, rather than rely upon a "substantial use" standard to determine if an ITFS license should be forfeited, we have determined that if an ITFS station remains unused for a one year period the license will be forfeited.

III. Significant Alternatives Considered and Rejected.

The Commission's other alternatives were: (1) to maintain broadcast quality transmission standards; (2) to prohibit temporary fixed stations; (3) to forbid the delivery of ITFS programming to cable headends; (4) to establish ITFS contours and interference ratios rather than rely upon the flexibility of local frequency coordination; (5) to maintain the process of applying for a construction permit and then applying for an ITFS license, rather than a one-step licensing process; and (6) to maintain a five-year license term rather than expand the term to ten years. To deny the rule changes affecting transmission standards, temporary fixed stations, delivery of ITFS programming to cable headends, frequency coordination at the local level, one-step licensing, and a ten-year license term would be to forego the beneficial objectives sought in this rule making. Maintaining the status quo would necessitate needless government paperwork and restrict licensees' flexibility to meet the needs of the public served by ITFS. A more restrictive approach to regulation likely would interfere with the realization of the full potential and benefits of ITFS.

35. Authority for adoption of the rules contained herein is contained in Sections 2, 4(i), and 303 of the Communications Act of 1934, as amended.

36. Accordingly, IT IS ORDERED, That Part 74 of the Commission's Rules IS AMENDED as set forth in Appendix A, effective upon adoption pursuant to 5 U.S.C. §553(d)(1).

FEDERAL COMMUNICATION COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 74 of Chapter of Title 47 of the Code of Federal Regulations is amended as follows:

Part 74 - Experimental, Auxiliary, and Special Broadcast, and Other Program Distributional Services.

1. In Section 74.15, paragraph (e) is amended to read as follows:

§74.15 Station license period.

* * * * *

(e) Licenses for instructional television fixed stations will be issued for a period of 10 years beginning with the date of the grant.

2. Section 74.901 is amended by adding the following definition in the appropriate alphabetical sequence as follows:

§74.901 Definitions.

* * * * *

Temporary fixed ITFS station. An ITFS station used for the transmission of material from temporary unspecified points to an ITFS station.

* * * * *

3. Section 74.902 is amended by adding a new paragraph (f) to read as follows:

§74.902 Frequency assignments.

* * * * *

(f) A temporary fixed ITFS station may use any available ITFS channel on a secondary basis. Operation of stations located within 35 miles of Canada shall be limited by Section 74.24(h)(3) of this Subpart.

4. Section 74.931 is amended by revising paragraph (d); and adding a new paragraph (g) to read as follows:

§74.931 Purpose and permissible service.

* * * * *

(d) Stations may be licensed in this service as originating or relay stations to interconnect instructional television fixed stations in adjacent areas, to deliver instructional and cultural material to, and obtain such material from, commercial and noncommercial educational television broadcast stations for use on the instructional television fixed system, and to deliver instructional and cultural material to, and obtain such material from, nearby terminals or connection points of closed circuit educational television systems employing wired distribution systems or radio facilities authorized under other parts of this chapter, or to deliver instructional and cultural material to any CATV system serving a receiving site or sites which would be eligible for direct reception of ITFS signals under the provisions of paragraphs (a) and (b) of this Section.

* * * * *

(g) On a secondary basis, an ITFS station may be operated as a temporary fixed station from temporary unspecified points to an ITFS station under the provisions of paragraph (a), (b), (d) or (e) of this Section.

5. Section 74.932 is amended by adding a new paragraph (d) to read as follows:

§74.932 Eligibility and licensing requirements.

* * * * *

(d) In case of permanent discontinuance of operation of a station licensed under this subpart, authority to operate is forfeited and the license shall forward the station license to the Commission for cancellation. For the purposes of this Section, a station which is not operated for a period of one year is considered to have been permanently discontinued If use of a channel(s) is discontinued, authority to operate on such channel(s) is forfeited and an application for modification shall be filed to delete such channel(s).

6. Section 74.937 is amended by revising paragraph (b) to read as follows:

§74.937 Antennas

* * * * *

(b) Directive transmitting antennas shall be used whenever feasible so as to minimize interference to other licensees. The radiation pattern shall be designed to minimize radiation in directions where no reception is intended. When an ITFS station is used for point-to-point service, an appropriate directional antenna must be used.

* * * * *

7. Section 74.938 is amended by revising paragraph (a), and by removing paragraphs (c), (d) and (e) in their entirety to read as follows:

§74.938 Transmission standards.

(a) The width of an ITFS channel is 6 MHz. ITFS transmitters must be type accepted by the Commission for the particular visual and aural signals that will be employed in actual operation. Either the manufacturer or the licensee must obtain transmitter type acceptance for the transmitter by filing an application for type acceptance with appropriate information concerning the signal waveforms and measurements.

* * * * *

8. Section 74.970 is amended by revising paragraph (b) to read as follows:

§74.90 Modulation limits.

(a) ***

(b) *Aural transmitter.* The maximum frequency deviation of the aural carrier shall not be permitted to exceed ± 75 kHz on peaks of frequent recurrence during any transmission. This is defined as 100% modulation.

9. Section 74.982 is amended by adding a new paragraph (f) to read as follows:

§74.982 Station identification.

* * * * *

(f) Temporary fixed ITFS stations shall identify with the call sign of the primary station and a temporary fixed identifier.

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

DISSENTING IN PART

RE: Report and Order Amending Part 74 in Regard to the Instructional Television Fixed Service (MM Docket No. 83-523).

I dissent from this decision in one respect — its extension of ITFS license terms to ten years.[1] By law, television broadcasting station license terms may not exceed five years.[2] Under the prevailing test of whether a

[1] *See Report and Order* para. 31.

[2] 47 U.S.C. Section 307(b).

particular activity is broadcasting,[3] ITFS facilities, when used for home television distribution (and all have that capability), certainly must be considered television broadcast stations. Therefore, it seems plain that ITFS operations may not be authorized for more than five years at a time (unless this Commission were to license programmer-lessees as broadcasters, a result not proposed by the majority here). The Commission has given neither reasoned analysis nor, indeed, any analysis whatever, in support of its determination on license terms. The agency's muteness on this important issue only days after being admonished by the United States Court of Appeals for the District of Columbia Circuit to be mindful of the restrictions imposed on broadcasters by the Communications Act[4] signals the Commission's apparent intention to disregard the requirements outlined by the Court's decision.

[3] *National Association of Broadcasters* v. *FCC*, No. 83-1926. slip op. at 13-27 (D.C. Cir. July 24, 1984); *United States Satellite Broadcasting Co.* v. *FCC*, No. 83-1692, slip op. at 19-20 (D.C. Cir. July 24, 1984).

[4] *See NAB* v. *FCC, supra.*

Common Carrier, Data Processing Service
Common Carrier, Interconnection, Customer-Provided
Common Carrier, Intrastate
Subsidiary Company

Computer II subsidiaries of BOCs permitted to act as sales agents for affiliated telephone company-provided intrastate basic services. Sale agency plans are expected to be in the public interest and consistent with the policy and objectives of *Second Computer Inquiry.*
—*American Information Tech. Corp.*

FCC 84-290

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
American Information Technologies Corp. BellSouth NYNEX	ENF File No. 84-10
Interim Capitalization Plans For the Furnishing of Customer Premises Equipment and Enhanced Services	
NYNEX Petition for Waiver of Section 64.702 of the Commission's Rules to Allow Marketing of Network Services by Separate Subsidiary	ENF File No. 84-18

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1984; Released: July 11, 1984

BY THE COMMISSION:

I. Introduction

1. We have before us interim capitalization plans filed by American Information Technologies Corp. (Ameritech), BellSouth, and NYNEX pursuant to the modified separation requirements we adopted regarding the customer premise equipment (CPE) and enhanced services activities of

the recently divested regional Bell Operating Companies (BOCs).[1] The companies seek our approval of various proposals to enable their separate subsidiaries to market basic services jointly with CPE.[2] Ameritech and BellSouth take the position that such joint sales efforts by separate subsidiaries are consistent with the modified *Computer II* rules[3] which we applied to the BOCs. NYNEX has argued that, to the extent its joint sales proposal may be considered inconsistent with the Rules,[4] the Rules should be waived. Parties to the reconsideration of the *BOC Separation Order*, parties commenting on the interim capitalization plans, and parties commenting on the NYNEX waiver petition have opposed the BOCs joint sales plans; Pacific Bell has supported the plans, and one party, the Vermont Public Service Board, has supported joint sales but has requested that the NYNEX joint sales force be left in the operating companies.[5]

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[1] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, (BOC Separation Decision) FCC 2d ____, 49 Fed. Reg. 1190 (Jan. 10, 1984) *reconsideration*, FCC 2d ____, FCC 84-252, (released June 1, 1984).

[2] Other issues raised by the interim capitalization plans will be addressed at a later date where appropriate.

[3] 47 C.F.R. §64.702; *see* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) 77 FCC 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration* 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[4] In its petition for reconsideration of the BOC Separation Order, NYNEX stated that it did not believe a waiver of the Rules was necessary to allow its "single sales force" to be placed in its CPE subsidiary, but it asked for such a waiver in the event we determined that its proposal was inconsistent with our Rules. NYNEX Petition for Reconsideration or Waiver in Docket No. 83-115, p.1 (February 10, 1984). On May 22, 1984, NYNEX filed a separate Petition for Waiver placing its complete proposal on the record.

[5] Five parties addressed joint marketing issues in pleadings in the reconsideration in Docket No. 83-115: North American Telecommunications Association ("NATA Comments") pages 17-19; Tandy Corporation ("Tandy Opposition") pp. 17-18; Independent Data Communications Manufacturers Association, Inc. ("IDCMA Opposition") pp. 61-63; Rolm Corporation ("Rolm Opposition") pp. 27-34; and Computer & Communication Industry Association ("CCIA Response") pp. 21-23. Joint marketing was also opposed by IDCMA and Rolm in their comments on the interim capitalization plans filed by the BOCs. IDCMA Comments, pp. 17-32, Rolm Comments, pp. 2-6. IDCMA, Rolm, CCIA, Tandy, NATA, and Pacific Bell filed comments addressed to NYNEX's May 22 waiver petition. NATA, Rolm, and NYNEX filed reply comments. We have taken all of these pleadings into account in our assessment of the benefits and disadvantages of the joint sales proposals. On May 28, 1984, the Vermont Public Service Board submitted late comments addressed solely to the NYNEX proposal in the proceeding on reconsideration of the BOC Separation Order. The Board also filed reply comments, along with a Motion to accept late-filed comments, on June 18, 1984. In order to assure a complete record, we accept these comments for consideration herein.

2. Ameritech and BellSouth have each proposed that their separate CPE entities act as sales agents solely for Centrex service.[6] A subsidiary would receive as a commission a percentage of the gross revenues from the services it sells. In the case of Ameritech, existing Centrex customers have also been assigned to the subsidiaries, which receive commissions in return for ongoing servicing of those customers' accounts. NYNEX has put forth a plan under which it would transfer to its *Computer II* subsidiary all telephone company premises sales and sales support personnel who currently sell network services to large business customers. NYNEX's proposal calls for the operating companies to pay the subsidiary for the costs it incurs in selling basic services. Penalty and incentive provisions designed to encourage the subsidiary to market operating company services will apply beginning in 1985. Ameritech and BellSouth have expressed intentions also to allow non-affiliated CPE vendors to become Centrex sales agents. None of these companies proposes to resell basic services. Ameritech states that the purpose of its sales agency proposal is to preserve the competitive viability of Centrex service, while NYNEX states that the ability to offer basic services and CPE together is necessary to avert bypass of the network by its larger customers.

3. We find that sales agency proposals are, in principle, in the public interest. Permitting a CPE subsidiary to market intrastate basic services can promote increased use of local exchange services. In addition, an operating company's marketing costs for basic services may be lessened by paying other companies to perform the marketing service on its behalf, since economies may be achieved by using one salesperson, rather than two, to sell both basic services and CPE. Furthermore, competition in the provision of CPE can be furthered by the inclusion of third parties in sales agency arrangements. Although there are some dangers inherent in a sales agency system, we believe that these dangers can be offset by implementing safeguards which can deter potential anticompetitive conduct and cross-subsidization. Any sales agency arrangement made available to the subsidiaries must be made available to unaffiliated vendors on the same terms and conditions which apply to the subsidiary. To further assure fair competition between subsidiaries and other CPE vendors, we require separate subsidiaries to order telephone services for their customers through the same nondiscriminatory centralized operations group mechanism used by other vendors. In addition, we require retention within the regulated telephone companies of sales and sales support staff

[6] Centrex is a business communications service in which switching of calls to, from and within a particular customer's premises, augmented by a variety of special features, is provided through switching facilities located at telephone company offices.

sufficient to allow the telephone companies to sell all of their services to customers who do not wish to deal with the CPE subsidiary.

II. The Sales Agency Proposals

A. Ameritech

4. Ameritech has established a CPE subsidiary within each of its five operating companies.[7] The operating companies have entered into Centrex marketing agreements and Centrex service agreements with their subsidiaries.[8] Each marketing agreement appoints the subsidiary as non-exclusive Centrex representative to promote the sale of Centrex service within its service area. Each month the subsidiary will receive as a commission a fixed percentage[9] of Centrex gross revenues from each Centrex customer to which it has made a sale of Centrex service during that month or in previous months. In return for this commission the subsidiary agrees to make Centrex sales a "substantial focus"[10] of its overall sales activities. The subsidiary is obligated to develop and carry out, at its own expense, a Centrex advertising campaign, with all advertising subject to prior approval by the operating company. The operating company reserves the right to continue to market Centrex directly to pre-existing Centrex customers, to operating company affiliates, and to customers contacting the operating company directly for service, but agrees to pay the subsidiary commissions on all such sales within the subsidiary's territory. Otherwise, the subsidiary has exclusive rights to sell Centrex services to a customer once it has made a Centrex

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[7] The Ameritech operating companies are Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, and Wisconsin Bell Telephone Company. The subsidiaries are called Illinois Bell Communications Inc., (Illinois BCI), Indiana Bell Communications, Inc. (Indiana BCI), Michigan Bell Communications, Inc. (Michigan BCI), Ohio Bell Communications, Inc. (Ohio BCI), and Wisconsin Bell Communications, Inc. (Wisconsin BCI). In addition, Ameritech has established as a subsidiary of the holding company Ameritech Communications, Inc., which will procure the CPE sold by its operating company subsidiaries and provide common support services to those companies.

[8] Draft copies of the agreements, which are substantially similar, were included in each company's interim capitalization plan. The agreements were described further in the Ameritech transmittal letter ("Ameritech letter") covering all five interim capitalization plans. At the time of the filing of the interim capitalization plans, all of the agreements except those involving Illinois Bell had been signed.

[9] The commission rates are Indiana BCI, 15%; Illinois BCI, 10%; Michigan BCI, 15%; Ohio BCI, 10%; Wisconsin BCI, 12.2%.

[10] Each of the contracts has been individually negotiated, and they contain minor language differences. All of the contracts contain best efforts clauses. The "substantial focus" language appears in the Michigan BCI draft agreement. These provisions leave substantial discretion in the operating companies to select third party vendors, see ¶5 below.

sale to that customer.[11]

5. Under the service agreements, each subsidiary has assumed ongoing marketing responsibility[12] for Centrex accounts existing in its service area on January 1, 1984. The subsidiary is paid commissions, based on a percentage of Centrex service revenues derived from these accounts. Ameritech stated that, in the period between January 1, 1984, and June 30, 1984, "the subsidiaries would have access to customer proprietary information for the Centrex accounts they manage and for other accounts that are regarded as Centrex or CPE sales prospects."[13] During the transition period Ameritech plans to solicit consent of Centrex customers and others for transfer of their customer proprietary information to the subsidiaries. Ameritech represents that, prior to July 1, 1984, all information which customers have not authorized to be transferred will be returned to the operating companies. Ameritech has represented that it will enter into substantially similar marketing agreements with a "reasonably manageable" number of unaffiliated CPE vendors.[14] To qualify for commissions, vendors will have to meet Ameritech's standards for financial stability, sales force commitment, experience, and professional standards.[15]

B. BellSouth

6. BellSouth's interim capitalization plan proposes marketing CPE through unincorporated Advanced Services Divisions (ASDs) within each of its two operating companies.[16] The plan states that the ASDs are

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[11] For example, the Indiana Bell Centrex marketing agreement states: "During the term of this Agreement, no Centrex representative other than (Indiana BCI) shall have the right to market or service Centrex to (Indiana BCI's) Centrex customers, and (Indiana BCI) agrees that it will not market or service Centrex to other Centrex representatives' Centrex customers."

[12] These responsibilities are described in the service agreement as "continuing Centrex system consulting, customer relations and Centrex support functions including, but not limited to: periodic personal contacts with Centrex customers; provision to customers of information available regarding technical, functional and other Centrex developments; engineering and technical support for customer service and installation; and handling of customer requests for new or changed service."

[13] Ameritech Response to Information Requests at 7.

[14] Ameritech cover letter, p. 4; Ameritech Responses to Information Requests p. 9-10. Michigan Bell Telephone Company has filed with us copies of letters stating its intention to enter into Centrex sales agency agreements with Executone Business Systems, Inc., and Motor City Electric, Inc. Letter from D.M. Lambe, Assistant Vice President, Marketing, Michigan Bell, to Mr. John Cosgrove, President, Business Systems, Inc., May 14, 1984; Letter from D.M. Lambe, Assistant Vice President, Marketing, to Mr. Frederick Somes, President, Motor City Electric, Inc., May 22, 1984.

[15] Ameritech Responses to Information Requests at 9-10.

[16] In the *BOC Separation Order*, ¶60, we stated that we would consider proposals to satisfy the *Computer II* structural separation requirements by using unincorporated divisions. Only BellSouth has proposed such a corporate structure. Our action in the

marketing "ESSX" (Centrex) on a commission basis. In response to requests from Bureau staff for more details about this marketing scheme, BellSouth submitted a copy of an internal memorandum concerning determination of the commission rates for each ASD.[17] BellSouth has represented it is developing plans to make an arrangement available to unaffiliated vendors.[18]

C. NYNEX

7. NYNEX has filed an interim capitalization plan for Business Information Systems Company (BISC), which will be a subsidiary of NYNEX, the holding company. BISC selects, procures, advertises, installs and maintains CPE for large business customers, defined by NYNEX as customers requiring twenty or more stations. According to NYNEX, such customers comprise 3% of NYNEX's total customer base but account for 66% of its revenues. The actual on-premises sale of CPE to these large customers will be carried out by a sales force, which will also sell network services pursuant to contracts ("Sales Force Agreements") BISC has entered into with New York Telephone Company (NYT) and New England Telephone and Telegraph Company (NET). NYNEX's interim capitalization plan indicates that all the operating company account executives and support personnel who currently market basic services through premises calls on large customers will be transferred to BISC. The telephone companies will remain responsible for the advertising, installation, maintenance and repairs associated with basic services. BISC and the operating companies will bill customers separately for their respective products and services. NYNEX states that BISC will place customer orders for the services sold by the sales force through the same centralized operations group (COG)[19] used by other CPE vendors to place

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instant proceeding does not imply approval or disapproval of this aspect of the BellSouth interim capitalization plan. The BellSouth division plan will be addressed at a later date.

[17] Memo to D.L. Strohmeyer, Vice President-Marketing from A.P. Jones, Assistant Vice President, Advanced Systems, dated December 5, 1983, Attachment #3 to BellSouth Response to Information Requests, March 30 1984. This memo indicates that the commission will be based on a factor of 17.2% which will apply to Southern Bell Telephone, while the factor for South Central Bell will be 20.8%, in each instance to be applied to revenues received from new accounts during the first year of service. *Id.* at 6.

[18] BellSouth Response to Information Requests, p. 16. BellSouth stated that details of plans to allow all qualified vendors to market ESSX would be provided to us by April 30, 1984. That filing has not been made.

[19] A COG is an organization established by each Bell Operating Company (BOC) to serve as a centralized point of contact for customers and vendors of CPE including key, PBX and multifunction systems. COGs were established pursuant to a settlement agreement between AT&T and some interconnect vendors. *Jarvis, Inc. v. American Telephone and Telegraph Co.*, Civil Action No. 74-1674 (D.D.C. settlement effective May 27, 1980). COGs process orders for BOC services relating to the interconnection of customer premises equipment including scheduling and coordination services. The first COG was

service orders for customers and that BISC will receive customer proprietary information only after authorization by the customer and on the same terms as any other vendor.

8. Costs for the sales force will be charged to the operating companies as follows. Each year BISC will commit to produce a set amount of incremental basic service revenues. A fixed dollar amount representing the estimated cost of producing those revenues will be negotiated between BISC and each of the operating companies at the beginning of each year,[20] subject to renegotiation should the operating companies determine that they could produce the same revenues at the same or lower cost by marketing the services themselves. If BISC's actual costs are later shown to have been lower than the fixed amount, only actual costs will be charged. BISC plans to determine what portion of joint sales costs[21] are allocable to sales of network services by analyzing employee time sheets for a two-week period during each calendar quarter. After 1984 a penalty-incentive clause will go into effect. If BISC fails to produce the agreed amount of revenues, payments to it by the operating companies will be reduced by a fixed percentage of the shortfall, subject to a floor below which the payment may not fall. If BISC produces more than the agreed amount, it will be paid as a bonus a fixed percentage of the excess, subject to an upper limit on the total amount BISC can receive.

III. DISCUSSION

A. Joint Marketing

9. This is the first time we have been asked to consider proposals for *Computer II* subsidiaries to be sales agents on a commission basis for affiliated telephone companies. In our *Computer II* decisions we announced that we would not regulate the provision of enhanced services or CPE. We allowed common carriers to provide enhanced services and CPE,

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established in 1980 and COGs were operational in all BOCs by the end of 1981. We recently directed the BOCs to implement appropriate non-discriminatory procedures and meet with interconnect vendors to resolve service problems reported by the interconnect industry in obtaining service interconnection on behalf of their customers. *NATA Petition for Emergency Relief*, FCC 84-132 at para. 2 and n.3 (released April 11, 1984). (*COG Order*).

[20] The Sales Force Agreements go into effect July 1, 1984, for an initial term of 6 months. Thereafter, they continue in effect through successive one-year terms until terminated by one of the parties. The fixed dollar amounts for the initial term are $30.5 million under the agreement with NYT and $3.7 million under the agreement with NET. Revenue commitments for the initial term are $253.7 million under the agreement with NYT and $46.7 million under the agreement with NET.

[21] The Sales Force Agreements list the following expense items as including joint sales costs: wages and salaries, employee related benefits, communication services, material-purchases, training education, advertising and promotion, house service, motor vehicle, contract services, data processing (IDP), rents, general direct, general indirect, supplies.

subject to safeguards designed both to protect ratepayers from subsidizing competitive ventures and to prevent carriers from using their ownership of transmission facilities to compete unfairly in the unregulated arena. We found that, with respect to AT&T, the best safeguard was structural separation of regulated activities from the provision of CPE and enhanced services. AT&T was required to place any CPE or enhanced services operations in subsidiary corporations established in conformance with separation conditions set out in Section 64.702 of our Rules. One aspect of separation was that the marketing of basic services be separated from the marketing of CPE or enhanced services:

> An essential thrust of the structural approach is to separate joint and common costs associated with regulated and unregulated activities. Ideally, the parent and subsidiary should have no joint or common costs to allocate, since the simplest mechanism for transferring competitive market costs to the regulated market is the misallocation of joint and common costs. . . . . More specifically, the separation of regulated and unregulated activities and associated costs requires that the subsidiary have its own operating, marketing, installation, and maintenance personnel for the services and equipment it offers. This means that the unregulated subsidiary must do its own marketing, including all advertising relating to the offering of any service or equipment it offers. *Final Decision* at 476-477.

Accordingly, we prohibited carriers subject to structural separation from marketing CPE or enhanced services. The rationale behind the joint marketing ban imposed on carriers, however, leads to the conclusion that joint marketing of CPE and network services by subsidiaries is also prohibited by the rules. The potential for misallocation of costs and the risks of anticompetitive conduct can exist no matter which corporate affiliate is conducting the joint marketing activities.

10. In the *BOC Separation Order* we applied modified structural separation conditions to the divested BOCs. In the course of adapting the *Computer II* requirements to the post-divestiture conditions in which the BOCs would be operating, we considered arguments that joint marketing should be generally permitted, subject only to separate accounting requirements. We again saw the opportunity for misallocation of common costs, and found that accounting controls might be inadequate to prevent or to expose cross-subsidization. We also found continued opportunities for anticompetitive activities:

> Furthermore, joint marketing may give the BOCs' marketing operations for unregulated products and services an important competitive advantage. Mixing the marketing of network facilities and unregulated products creates the potential for abuses which the Computer II rules sought to prevent, *i.e.*, the monopoly network facility provider's use of monopoly-derived revenues and its monopoly position to gain unfair leverage in unregulated markets. After divestiture, this control over local bottleneck facilities will continue with the RBOCs in a similar fashion as the bottleneck control which existed with AT&T when the separation conditions were first imposed. *BOC Separation Order*, para. 66.

We required that the BOCs cease all joint marketing activities other than dial tone referral[22] after a six-month transition period which ends June 30, 1984.[23]

11. Of course, our *Computer II* rule prohibiting joint marketing does not address the permissibility of telephone companies entering into sales agency agreements with third parties to permit those parties to market jointly CPE and network services. There indeed may be legitimate business reasons for telephone companies to contract with others, who may be able to provide marketing services at a lower cost than can the telephone company itself. Such sales agency arrangements can increase customer convenience, decrease rates for basic services, and promote the use of basic services.

12. Other problems are presented, however, when *Computer II* subsidiaries agree to be sales agents for basic services. The limitations on the provision of CPE together with basic services by subsidiaries are embodied in the rule that subsidiaries must conduct independent marketing activities using a marketing force separate from those of the BOCs.[24] This requirement of independence, though fundamental, has not been considered an absolute bar to all joint activities.[25] In order to determine whether the sales agency proposals before us should be permitted as an exception to the general ban on joint marketing, we must weigh the possible benefits to be gained from the proposals against the possible disadvantages.[26]

B. Possible Benefits of Joint Sales

13. An advantage which the BOCs hope to gain from sales agency is that customer convenience can be improved by permitting the customer to obtain CPE and network services from one source.[27] NYNEX asserts that

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[22] Dial tone referral was an exception to the general restrictions on joint marketing, whereby we allowed BOCs to refer BOC customers to their separate subsidiaries for CPE, provided the reference is made in a neutral manner. Neutral referral includes informing the customer that CPE is available from other vendors as well as from its subsidiary. *BOC Separation Order* ¶¶66, 67.

[23] In order to facilitate their reentry into the CPE market, we permitted the BOCs to reenter CPE markets without structural separation on January 1, 1984. They were requested to file interim capitalization plans for their *Computer II* subsidiaries January 30, 1984. By June 30, 1984, they should file permanent capitalization plans to be effective January 1, 1985. The BOCs should be in full compliance with our Rules on June 30, 1984.

[24] 47 C.F.R. §64.702(c)(2); *see* CPE Compliance Order, 93 FCC 2d 599, 600, 616 (1983) (joint visits to BOC and Long Lines customers by BOC or Long Lines representatives together with representatives of AT&T's *Computer II* subsidiary without a specific unsolicited request by a customer found to violate ban on joint marketing).

[25] *See* BOC Separation Order §62-64 (discussion of joint administrative services); General Departments Order, 90 FCC 2d 184 (1983); Shared Services Order, 92 FCC 2d 676 (1983).

[26] BOC Separation Order, ¶5.

[27] NYNEX Petition at 12.

large customers require the convenience of dealing with a single sales force for both CPE and exchange services, and that such customers will avoid dealing with the *Computer II* subsidiary in favor of competitors if the subsidiary cannot supply all of their telecommunications needs. This position is challenged by Rolm, which points out that all of Rolm's customers must obtain network services separately from a telephone company.[28] CPE vendors such as Rolm do, however, act as agents for their customers to order basic services to meet the customers' needs and equipment. The BOCs' CPE subsidiaries also have this capability of ascertaining customers' basic service needs and placing orders to meet those needs.[29] Thus most of the benefits to the customer of "one stop shopping" can already be provided by the subsidiary acting as ordering agent for its customers. Commission sales, on the other hand, assure that subsidiaries and outside vendors will benefit financially from their sales efforts when those efforts lead to purchase by customers of local telephone services. The principal advantage, then, of the sales agency approach is that payment of a commission to the subsidiary and others for the effort expended in marketing basic services will induce the CPE suppliers to promote the use of basic services.[30]

14. Ratepayers may also benefit from the sales agency arrangements, since the marketing costs of the telephone companies may be reduced by having others perform marketing services on their behalf. This reduction, as NYNEX has pointed out, will be due in part to economies which may be achieved by eliminating duplicative sales calls. The participation of third-party vendors may also help reduce costs by providing a check on the reasonableness of commissions. This limit on marketing expense should benefit ratepayers by holding down the amount the telephone companies would have to pay for these marketing services.

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[28] Rolm Opposition to Petition for Reconsideration at 28.

[29] The sales agency arrangements permitted herein do not encompass joint preparation of bids by BOCs and their *Computer II* subsidiaries. Subsidiaries may, as may any CPE vendor, include in their independently-prepared bids the offer to obtain basic services for the customer at the tariffed price.

[30] The equipment and service components of any telecommunications "package" sold by a commission sales agent would have to, of course, be priced on an unbundled basis. That is, basic services marketed on behalf of the operating company would be sold by the operating company at the tariffed price, while CPE would be sold at a price established by the subsidiary on a deregulated basis. Our decision herein to allow marketing of basic services by *Computer II* subsidiaries and others is not intended to affect the availability to consumers of basic services at the tariffed prices. Furthermore, the BOCs have each represented that the telephone companies will bill customers for basic services; we do not grant permission for sales agents to bill customers for basic services.

C. Possible Disadvantages of Joint Sales

15. Like any intermixture of regulated and unregulated activities, the joint sales proposals before us raise concerns about the potential for anticompetitive abuse and cross-subsidy. One serious concern, which has been expressed by Rolm and by the Vermont Public Service Board,[31] is that an operating company might transfer to its subsidiary all of the sales and sales support persons capable of handling complex service needs, leaving the operating company without the capability to meet customer requirements independently. The Department of Justice (DOJ) has expressed identical concerns in a pleading filed with the district court regarding the MFJ, in which DOJ opposes NYNEX's petition to expand BISC's product line to include computers and office equipment.[32] DOJ believes that NYNEX's plan to perform all marketing activities directed to large customers through BISC could create broad anticompetitive effects by permitting BISC to use its monopoly position in basic services to leverage its way into unregulated markets.[33] Under NYNEX's proposal, every customer with more than twenty stations would be referred to BISC to obtain network services. Absent independent sales and sales support functions within the operating company, customers would have to deal with the *Computer II* subsidiary for all exchange services even when obtaining CPE from competitors of the subsidiary. BISC would thus become the exclusive interface for the provision of complex network services, and as a consequence would acquire valuable information concerning a customer's equipment which would be used by BISC to market CPE to that customer. Even BISC's competitors could be forced to depend on BISC for exchange services needed by their large customers unless the operating companies continued to possess adequate marketing support capability. We agree that such a situation poses potential anticompetitive threats to other CPE vendors as well as causes inconvenience to customers who wish to obtain services directly from the BOC. Operating companies must retain experienced sales and sales support

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[31] The Vermont Public Service Board has filed comments and reply comments with respect to New England Telephone Company's participation in NYNEX's proposed single sales force arrangement. The Board favors joint marketing of CPE and basic services but asks that we permit a joint marketing force to be established within New England Telephone Company rather than in BISC. The Board's position has been endorsed in informal comments by the state commissions in Massachusetts, Rhode Island, and New Hampshire. Such an arrangement, however, would raise important issues which we are not prepared to address on the basis of the record before us in this proceeding.

[32] Response of the United States to Motion of NYNEX Corporation to Provide Office Equipment and Related Services, filed in United States District Court for the District of Columbia, Civil Action No. 82-0192, March 22, 1964. (DOJ Response). We do not have before us the matters at issue in this proceeding.

[33] *Id.* at 15.

staff in each telephone company in sufficient numbers to assure that the telephone company will deal directly and effectively with all customers and interconnect vendors without referring those customers to the subsidiary or other agents to obtain network services.[34]

16. Moreover, as IDCMA and Tandy point out, sales agencies could foster anticompetitive abuses if, for example, a CPE subsidiary were able to promise its customers better telephone service, quicker installation, or more reliable maintenance than they could get if they purchased equipment elsewhere. Consequently, the subsidiary may not represent to its customers that it is able to provide better telephone services than other network service sales agents or that it is the exclusive sales agent for network services. This danger is also reduced since the subsidiaries are required to place all service orders through nondiscriminatory COG-like mechanisms designed to eliminate discrimination among CPE vendors in the processing of service orders.[35] In addition, competitive abuses which do develop can be corrected through our complaints process.[36] If customers know that the same service is available to them regardless of where they purchase their CPE, the CPE subsidiary of a carrier should gain no competitive advantage in the CPE market from its affiliation with an operating company. Similarly, if the terms of the sales agency agreement are the same for all vendors of network services, potential abuses arising from the close corporate relationship between the operating company and the subsidiary can be minimized.

17. Several parties have pointed out that such sales agency arrangements present the possibility that the CPE subsidiary will acquire information not available to its competitors and thus gain an improper competitive advantage.[37] However, these concerns, which exist whether

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[34] The NYNEX plan to transfer its entire premises sales force to BISC appears to fall short of this requirement. Furthermore, any sales agency plan under which operating companies would refer customers seeking tariffed services to their *Computer II* subsidiaries would be inconsistent with the permission granted herein.

[35] *See* COG Order, n.19, *supra.*

[36] Our conclusion, *infra*, that the proposed sales agency relationships between *Computer II* subsidiaries and their affiliate operating companies will be permitted as an exception to the general joint marketing ban should not be read as permitting joint advertising or coordinated joint marketing activities. The subsidiary will be permitted to market basic services itself, but not in concert with the operating company. Thus, Ameritech's joint advertising requirements in its Centrex marketing agreements are not consistent with the Rules. In addition, BellSouth's current plan to have the head of each CPE division report directly to a telephone company Vice President for Marketing will lead to coordinated marketing endeavors which go beyond the scope of permitted sales agency described herein. Furthermore, NYNEX operating companies' control of BISC marketing strategy and the selection of management personnel exceeds the permission granted herein for similar reasons.

[37] This can be perceived as a problem even if DOJ's concerns about customers being forced to turn over information to the subsidiaries, see ¶17, above, are alleviated.

or not there is sales agency activity, are readily met by explicit provisions of our Rules which (1) require public disclosure of network information on the same terms as that information is made available to subsidiaries, Section 64.702(d)(2), and (2) require that, if customer proprietary information is made available to a subsidiary without customer authorization, that information must also be disclosed to competing suppliers, Section 64.702(d)(3).[38] Thus, a BOC will not be able to give its CPE subsidiary "inside information" about upcoming changes in the network which might affect sales plans unless it is ready to make the same information available to other CPE vendors.[39] Furthermore, interconnect vendors may always, with customer authorization, obtain from a BOC needed customer proprietary information whether or not such information has been made available to the BOC's subsidiary. We expect that our information disclosure requirements will be reinforced by the participation in sales agency programs of third party vendors who will be in a position to avail themselves of information contemporaneously with the *Computer II* subsidiaries.

18. Finally, the parties argue that a sales agency arrangement between the operating company and the unregulated subsidiary presents an opportunity to shift costs from unregulated activities to regulated services. We cannot discern from the materials which have been provided to us whether the various commission rates proposed by Ameritech and BellSouth, which range from 10% to 20.8%, are reasonable. They have not demonstrated that the commissions are related to either the cost to the subsidiary of selling Centrex service or to a market-rate commission the carrier would be willing to pay to an unaffiliated entity. In addition, while NYNEX's proposal suggests that payments to the subsidiary will be based on BISC's costs of marketing basic services, its proposal raises other questions because BISC will apparently receive substantial payments whether or not it produces sales of basic services.[40] The Department of Justice has also expressed concern that subsidization of BISC by the NYNEX operating companies may be the inevitable result of the fact

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[38] *See* Second Computer Inquiry, Order on Reconsideration, 84 FCC 2d at 83.

[39] The network information disclosure rules require that all information about central office equipment availability which is made known to a carrier subsidiary must also be made known to third parties. In addition, our requirement herein that third parties participate in sales agency programs on the same terms and conditions as subsidiaries means that any training or training manuals made available to the subsidiary must be made available to all other sales agents on similar terms and conditions.

[40] The NYNEX sales force agreements do provide for cancellation on 60-days notice during the initial contract term, which would give the operating companies the opportunity to withdraw on short notice if the sales agency arrangement does not produce sufficient sales. After the initial term, however, a 360 day notice is required for cancellation, making withdrawal a less effective control over BISC marketing costs.

that the jointly funded "single sales force" makes up over 75 percent of BISC's staff.[41]

19. No BOC has requested permission to pay commissions to sales agents for sale of interstate services, and we do not grant such permission. The record before us is insufficient to allow us to consider the ramifications of allowing joint sale of CPE and interstate services. A rulemaking proceeding would be necessary to consider whether authorizing commission sales of interstate services would be in the public interest.

20. With respect to payment by BOCs to their subsidiaries of commissions on sales of intrastate services, an important safeguard against cross-subsidies is the ability of state regulatory commissions to prohibit payment of any commissions, or to disallow part of the commissions from revenue requirements used to set rates for basic services. State commissions will have the opportunity to compare the BOCs' marketing costs under the sales agency plans with past marketing costs, and should be able to take action if marketing basic services through the subsidiaries and other agents proves unreasonably expensive as compared with marketing services directly by the BOCs. Because the sales commissions are limited to intrastate services, none of these costs should be included in the revenue requirements for interstate services, including interstate access services.[42] Our action in this proceeding is also without prejudice to the ability of state regulatory commissions to disapprove any transfers of basic services marketing personnel out of the operating companies.

21. Ameritech suggests that its plan to permit third-party vendors to receive commissions will help assure that the operating companies do not make unreasonably high payments to their subsidiaries. We agree. We are also concerned about possible anticompetitive affects of having the subsidiaries as the only vendors that can receive revenues from marketing CPE as well as from marketing the BOCs' basic services. However, for this safeguard to be effective, and for the operating companies to receive the maximum benefits from sales agency marketing, each BOC must allow a reasonable number of bona fide third party vendors[43] to participate fully in these plans, on a nondiscriminatory basis. Other vendors must be offered the opportunity to earn the same percentage commissions as the subsidiaries, and on the same terms and conditions.

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[41] DOJ Response at 17-18.

[42] See *MTS and WATS Market Structure, Third Report and Order,* CC Docket 78-72, Phase I, 93 FCC 2d 241 (1983), *reconsideration,* 48 Fed. Reg. 42987, *further recon.,* 49 Fed. Reg. 7810, *further recon. pending, appeal filed,* No. 83-1225 (D.C. Cir., March 1, 1983).

[43] We caution the BOCs that the permission granted herein to pay commissions to *Computer II* subsidiaries and other bona fide vendors should not be abused as a means of granting rebates to customers who "sell" services to themselves or their affiliates.

These terms and conditions should not as a practical matter become so onerous as to preclude or discourage third party participation. For example, Ameritech should revise the terms of its marketing contracts so as not to require the substantial focus of a third party vendor's sales activities to be Centrex sales, since this will discourage participation by non-affiliated vendors. Ameritech should for the same reason remove from its sales agency contracts the requirement that Centrex sales representatives participate in and pay for Centrex advertising campaigns.

22. A serious concern is raised by the fact that Ameritech operating companies transferred existing Centrex service accounts to their subsidiaries without providing third parties the same opportunity. The transfer of such a large base of Centrex customers to the subsidiaries seems to leave relatively few prospective Centrex users as potential customers to whom unaffiliated vendors can market additional Centrex services. The exclusivity clauses in the Centrex marketing contracts exacerbate this problem by allowing the subsidiaries, which were given the head start provided by the service agreement arrangements at least 5 months before finalization of any agreements with third party vendors, to keep all of the existing Centrex customers to themselves indefinitely. Therefore, Ameritech's plan does not provide for outside participation at a level sufficient to act as a meaningful check on excessive commissions. Ameritech's revised plan should transfer Centrex accounts in existence January 1, 1984 back to the operating companies no later than 30 days following release of this order.[44] Sales agents should only receive commissions based on revenues directly attributable to their own sales efforts. The telephone companies may not restrict a sales agent's access to any potential Centrex customers.[45] Unlike the Ameritech proposal, the NY-

[44] Ameritech must transfer back to the operating companies all of the responsibilities and activities regarding Centrex accounts in existence January 1, 1984, which were assumed by the subsidiaries pursuant to the Centrex Service Agreements. Revenues received by each subsidiary which are attributable to Centrex services not sold by the subsidiary will be offset against the amount of capitalization proposed for that subsidiary. Any customer proprietary information transferred to a subsidiary with respect to Centrex accounts must either be returned to the telephone company or disclosed to other vendors, unless the customer has authorized transfer of the information. Upon customer request, such information, including information properly retained by the subsidiary, must be made available to other vendors.

[45] We also see no justification for permitting payment of a commission to the subsidiary on sales made by the telephone company, as Ameritech proposes. An additional concern is raised by the provision in the Ameritech service agreements under which Ameritech would have delegated to its subsidiaries various "Centrex support functions" including "technical support for customer service and installation" n.12, *supra.* Under no circumstances may a sales agency arrangement provide for or lead indirectly to transfer out of the operating companies of responsibility for installation and maintenance activities related to the provision of basic services.

NEX commission plan does not permit even in principle third party participation on similar terms and conditions. Within 30 days of the release of this order, Ameritech, NYNEX, and BellSouth should submit their revised plans, including sales agency contracts with their subsidiaries and with third party vendors, which comport with this order.

IV. Conclusion

23. We believe that the balance we have struck here, to permit the *Computer II* subsidiaries of the BOCs to act as sales agents for affiliated telephone company-provided intrastate basic services, is in the public interest and is consistent with the policy and objectives of the *Second Computer Inquiry.* The sales agency programs may stimulate competition in marketing CPE. Additional public benefits may accrue from reducing the operating companies' marketing costs for basic services. Ratepayers should also benefit by promotion of the use of basic services.

24. We remain mindful that there are dangers of anticompetitive abuse and undetected cross-subsidy which may result from sales agency agreements. However, we believe they can be minimized if the telephone company retains sufficient sales staff to enable customers and interconnect vendors to obtain necessary support services; if sales agency programs are available to outside participation on a nondiscriminatory basis; and if the COG-like procedures are used to process basic service requests by all CPE vendors, including the BOC subsidiary. Therefore, we find that sales agency plans as defined herein do not compromise the operational independence of *Computer II* subsidiaries and should be permitted as an exception to the general ban on joint marketing, as discussed previously. Ameritech, BellSouth and NYNEX should file their revised sales agency plans, including sales agency contracts, which are consistent with this order within 30 days of the release of this order.[46] Ameritech, BellSouth and NYNEX must, within 30 days of the release of this order, either operate in compliance with this order or discontinue their

[46] We will monitor all approved sales agency plans to assure continued compliance with the conditions discussed above and the existence of sufficient third-party participation to satisfy our policies against anticompetitive conduct and cross-subsidy. So that we may determine whether BOCs and their subsidiaries are complying with this Order, we require each BOC operating under an approved sales agency plan to report on an annual basis the following information: (1) identify what services were sold by sales agents; (2) identify each service for which more than 50% of the total commissions paid for sale of that service to all sales agents was paid to a BOC subsidiary; and (3) specify, for each service marketed by sales agents, the average (mean and median) times for order processing, installation, and maintenance for the customers of the subsidiaries and for the customers of each unaffiliated sales agent. If it appears that a BOC's sales agency program is becoming a vehicle for anticompetitive abuses, we will withdraw our approval of that BOC's sales agency plan.

current arrangements to the extent those arrangements are inconsistent with this order.

V. Ordering Clauses

25. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended (47 U.S.C. Sections 154(i) and (j)), that the Petition for Waiver of NYNEX, IS GRANTED to the extent described herein but DENIED in all other respect.

26. IT IS FURTHER ORDERED that the sales agency proposals contained in the interim capitalization plans of Ameritech Corp. and BellSouth ARE APPROVED to the extent described herein but DENIED in all other respects.

27. IT IS FURTHER ORDERED that Ameritech Corp., BellSouth, and NYNEX within 30 days of the release of this order supplement their interim capitalization plans to demonstrate modification of their sales plans in compliance with our decision in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covers more area and population overcomes opponent's slight preference for its usage sensitive rate structure (not rate levels). No preferences awarded for applicants' analysis of demand or for ability to accommodate local or roamer demand and for the proposed systems expansion plans. —*American Mobile Communications*
CC Docket No. 83-3

FCC 84-368

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	CC Docket No. 83-3
American Mobile Communications of Washington and Oregon	File No. 26105-CL-P-(11)-82
Interstate Mobilephone Company	File No. 26148-CL-P-(9)-82
Cellular Mobile Systems of Washington, Inc.	FIle No. 26182-CL-P-(13)-82
For a Construction Permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Seattle-Everett, Washington, Metropolitan Statistical Area.	

Appearances

Henry Goldberg, William H. Crispin, Michael J. Wilhelm, Phillip L. Spector and *William E. Kennard* on behalf of American Mobile Communications of Washington and Oregon; *Carl W. Northrop, Diane B. Cohn* and *L. Andrew Tollin* on behalf of Interstate Mobilephone Company; *Edward P. Taptich, William K. Keane* and *Jean L. Kiddoo* on

behalf of Cellular Mobile Systems of Washington, Inc.; and *James O. Juntilla* and *Robert W. Spangler* on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

FINAL DECISION

Adopted July 26, 1984; Released August 8, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT;
COMMISSIONER DAWSON DISSENTING AND ISSUING A STATEMENT.

Background

1. The captioned applicants have filed exceptions to the Initial Decision of Administrative Law Judge Edward J. Kuhlmann in the Seattle nonwireline cellular proceeding. *American Mobile Communications of Washington and Oregon*, FCC 83D-55, released September 20, 1983. The Initial Decision (*I.D.*) granted the application of Interstate Mobilphone Company (Interstate) and denied the mutually exclusive applications of American Mobile Communications of Washington and Oregon (AMCOM) and Cellular Mobile Systems of Washington, Inc. (CMS). Judge Kuhlmann concluded that Interstate's application was superior under designated issues (a) and (b) and that grant of Interstate's application would serve the public interest, convenience and necessity. AMCOM and CMS except to every aspect of the *I.D.* and Interstate filed limited exceptions. For the reasons stated below we affirm the *I.D.*, as modified by this Decision, and we affirm the grant of the Interstate application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated by reference herein.

2. On January 12, 1983, the Common Carrier Bureau designated the mutually exclusive applications of Interstate, AMCOM and CMS for comparative hearing on the following issues:

(a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed

rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.[1]

The Common Carrier Bureau's Separated Trial Staff was also made a party to the proceeding.

3. Pursuant to the special procedures governing evaluation of cellular radio applications for the top-30 markets, 47 C.F.R. § 22.916(b)(1), the applicants filed their applications and direct cases on June 7, 1982. Rebuttal testimony was filed on February 18, 1983. A hearing Session was held on April 22, 1983 and by *Order*, FCC 83M-1372, released April 27, 1983, the presiding judge admitted relevant exhibits into evidence, ruled on requests for cross-examination and closed the record in the proceeding. Proposed Findings of Fact and Conclusions of Law were filed by the parties on June 15, 1983. Reply Findings were filed on July 6, 1983.

4. In the *I.D.* the judge awarded Interstate a substantial comparative preference under Issue (a) for its proposed superior geographic area and population coverage, as well as for its ability to accommodate anticipated demand for service. (I.D., para. 79). Interstate also received a comparative preference under Issue (b) for its superior system expansion plan. (*I.D.*, para. 85). The judge gave CMS a comparative preference under issue (c) for its proposed rate structure but concluded that this preference did not outweigh the substantial preferences awarded to Interstate under issues (a) and (b) (*I.D.*, para. 91).

5. On October 25, 1983, AMCOM, CMS and Interstate filed exceptions. CMS also filed a Motion to Reopen the Record and on May 31, 1984 a Petition to Reopen the Record.[2] Replies were filed. AMCOM also filed a request for consolidated oral argument for this case and the Portland proceeding. By *Order*, CC 3738, released April 23, 1984, the Common Carrier Bureau denied AMCOM's request for oral argument.[3]

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[1] American Mobile Communications of Washington and Oregon, (Seattle Designation Order), 52 RR 2d 1520 (Com. Car. Bureau 1983) (Footnotes omitted).

[2] See para. *60, infra*. On April 30, 1984, CMS filed a Petition for Leave to file Supplement to Exceptions and a Supplement thereto. In the supplement CMS reargues its exceptions and the merits of its application in light of the Chicago and Pittsburgh Decisions (Rogers Radiocall, Inc., FCC 84-62 released March 6, 1984; MCI Cellular Telephone Company, FCC 84-61, released March 6, 1984), which were decided after the exceptions in this proceeding were filed. CMS' petition is hereby granted to the extent that we are taking into account our Chicago and Pittsburgh Final Decisions in reaching our conclusions in this case.

[3] On May 23, 1984, AMCOM filed an Application for Review of this Order. AMCOM alleges the Bureau's decision that oral argument would not enhance the Commission's understanding of the issues raised was erroneous. AMCOM has not persuaded us that oral argument was needed in this proceeding. We therefore deny the application for review.

II. Issue (a)

6. This issue calls for a comparison of the geographic areas and population the applicants propose to serve, the relative demand for services in these areas and the ability of each applicant's system to accommodate the anticipated demand for both local and roamer service.[4] *See Rogers Radicall, Inc. (Chicago Final Decision,* FCC 84-62, released March 6, 1984, at para. 8, *recon. pending; MCI Cellular Telephone Company (Pittsburgh Final Decision),* FCC 84-61, released March 6, 1984 at para. 9, *recon. pending.*

7. *Geographic Area and Population.* The judge found that the Seattle MSA encompasses 4,513 square miles in King and Snohomish counties. The MSA's 1980 census population is 1,607,469. The following table provides the judge's findings with respect to the overall area and population served by each applicant.

	Geographic Area		*Population*	
	Total Served	*Percentage of MSA*	*Total Population*	*Percentage of MSA*
AMCOM	1,030 sq. mi.	22.82%	1,448,000	90.2%
Interstate	1,802 sq. mi.	39.9%	1,573,320	97.8%
CMS	1,345 sq. mi.	29.8%	1,518,258	94.4%

The figures are based on the applicants' calculations of area and population falling within their 39dBu contours, using (except in the case of AMCOM) a 100-foot minimum default elevation to calculate propagation. *See* 47 C.F.R. § 22.504(b); *I.D.* at para. 7 & nn. 2-3.[5] While the judge

See also American Mobile Communications of Washington and Oregon, (Portland Decision), FCC 84-371, adopted July 26, 1984.

[4] In *Cellular Communications Systems,* 86 FCC 2d at 502, we stated that the geographic area which an applicant proposes to serve would be a major basis of comparison. We also stated that "the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics, as well as indications of a substantial public need for the services proposed, including results of public need surveys" would be significant factors to consider.

[5] Section 22.504(b) does not contain propagation curves for antenna heights less than 100 feet above average terrain. In such cases, engineers must use one of several approximation methods. Interstate and CMS elected to use the 100 foot curve as a default. AMCOM elected instead to employ a method employed by Motorola, its engineering consultant: a height is used that is equivalent to ten percent of the antenna's height above ground level. AMCOM's method resulted in a smaller predicted coverage area than if the other method had been used. After designation for hearing, AMCOM asked leave to amend its coverage estimates by conforming its propagation analysis to the method used by the other applicants. This would have resulted in an increase in AMCOM's population coverage to 1,511,314, or 94%, and in area coverage to 1,351 square miles, or 29.9%. The judge denied this request as an attempt at impermissible comparative upgrading. Memorandum Opinion and Order, FCC 83M-997, released March 29, 1983, at para. 20; *I.D.* at n. 2.

found that none of the applicants proposed to serve the entire Seattle MSA, all three were found to cover "recognizable areas likely to have high mobile usage." *I.D.* at para. 61. The judge preferred Interstate's proposal for its greater coverage overall and its significant "pocket" coverage (i.e., areas covered by Interstate but not the other applicants). *I.D.* at paras. 8-9, 61-65.

8. The judge found that Interstate's system would cover 10 percent more of the geographic area of the MSA than CMS's proposal and 17 percent more than AMCOM's; it would serve 3 percent more of the population than CMS's and 7 percent more than AMCOM's. In comparing the applicants' pockets of unique coverage, the judge preferred Interstate's system because its pockets were "significant and necessary to provide adequate coverage" to the Seattle MSA. *I.D.* at para. 64. He found that one of Interstate's pockets would cover a portion of Interstate highway 5 and the city of Auburn, which were not covered by AMCOM, the second-largest applicant; this would provide coverage to 109,384 persons and permit uninterrupted coverage of route 5. In addition, Interstate's proposal covered an area to the north and east of Seattle not covered by AMCOM, with a population of 17,393. Interstate would also serve Sultan, Enumclaw, and Carnation, and the traffic arteries connecting them to Seattle; CMS would not serve these areas. *I.D.* at paras. 8, 9, 64.

9. AMCOM and CMS argue that the Judge's findings about Interstate's coverage proposal were in error. AMCOM charges that Interstate's pocket coverage was not the result of its market research and contains areas that do not have need for cellular service. Therefore, according to AMCOM, the judge erred by giving Interstate credit for coverage which is unnecessary and uneconomical. Finally, AMCOM alleges that consideration of 39dBu contours instead of the CGSA was wrong. CMS alleges its coverage is qualitatively superior to the other two applicants' and that it is entitled to a preference for its depth of coverage and building penetration, and that the judge erred by not considering coverage to portables.

10. We agree with the judge's conclusion that Interstate should be preferred under this issue. Even though it has the fewest cells (9,

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AMCOM charges that the judge erred in making this ruling. We affirm. It is well established that a post-designation comparative upgrade will not be permitted. AMCOM chose to use the Motorola methodology instead of the 100-foot default, and it cannot now choose a more favorable methodology in order to obtain comparative advantage. In any event, even if AMCOM had been permitted to upgrade, it would still rank significantly behind Interstate in area and population coverage. Furthermore, even under AMCOM's amendment, Interstate's pockets of coverage not served by AMCOM include 106,061 persons, 2,149 businesses, and 30,126 employees; AMCOM's pockets, on the other hand, cover 2,867 persons, 51 businesses, and 282 employees. Interstate Reb. Ex. 2 at 13.

compared with 11 and 13), Interstate's proposed system is the largest, covering substantially more of the geographic area and population of the MSA than CMS or AMCOM. The record supports the judge's findings that Interstate demonstrated the additional coverage areas it proposes are significant and necessary to provide adequate coverage and to the Seattle SMSA. *See*, e.g., Interstate Reb. Ex. 2 at 2-9. The Judge found, based on the record, that Interstate's decision to extend its service contours to the particular areas it covered was based on demographic information and other research conducted on its behalf by Compucon. *See I.D.* at paras. 64 and 65; Interstate Exs. 12 and 13). In its rebuttal case, Interstate demonstrated that the areas in its pockets were highly significant for a Seattle cellular system. Interstate's coverage of Interstate 5 and the city of Auburn, which were not covered by AMCOM, would extend service to a large population and permit uninterrupted service along Interstate 5, a major traffic artery demonstrated by Interstate to have a substantial public need for cellular service. Other Interstate pockets cover residential areas to the north and east of Seattle, as well as Sultan, Enumclaw and Carnation and the major traffic arteries connecting these communities to Seattle. The pocket areas not covered by Interstate which CMS and AMCOM would cover are insignificant when compared to Interstate's pocket areas. For example, one pocket which AMCOM would serve has a population of 119 with no businesses, no major highways and 12 high income households. Gaps in Interstate's proposal which are served by CMS are equally insignificant. CMS's proposal would serve four areas that Interstate would not, with a population of 3,335, 48 businesses, 501 employees and 173 high income households. We agree with the judge that Interstate, on the basis of its area and population proposals, is the best applicant. (*I.D.*, at para. 65).

11. We affirm the judge's use of the 39dBu contours instead of CGSAs in comparing the applicants' proposals on this issue. In the *Designation Order* at n. 18, *supra*, the Bureau, following precedent, explained that for purposes of comparison, the geographic area an applicant proposes to serve includes that area within the proposed 39dBu which, in turn, falls within the Cellular Geographic Service Area and the relevant Metropolitan Statistical Area. We have consistently compared cellular systems on the basis of their 39dBu contours rather than their CGSAs.

12. Finally, we conclude the judge was correct in not giving CMS a preference for its depth of coverage proposal. The record in this proceeding supports the finding that CMS has not demonstrated that building penetration and service to portables would be inadequate without its proposed depth of coverage. *See Rogers Radiocall*, FCC84-62 at para. 14; released March 6, 1984 (*Chicago Final Decision*); *MCI Cellular*

Telephone Company, FCC 84-61 at para. 42, released March 6, 1984 (*Pittsburgh Final Decision*).

13. *Relative Demand for Service.* The applicants forecasted subscriber demand as follows:

Year of Operation	*AMCOM*	*Interstate*	*CMS*
1	3,462	949	1,091
2	4,563	1,371	2,537
3	6,147	1,903	4,348
4	8,851	2,640	5,793
5	11,454	3,605	7,232
10	16,209	12,721	No Forecast
11	16,717	15,577	No Forecast

I.D. at para. 11; AMCOM Vol. III, Interstate Ex. 12, CMS Ex. IV.

CMS Ex. IV.

14. AMCOM's market demand forecast is based primarily on research conducted by Arthur D. Little, Inc. (ADL). However, AMCOM also utilized several other research studies. AMCOM commissioned a telephone survey of households in Seattle and the other top-30 markets in which AMCOM is an applicant. This research was conducted by National Family Opinion, Inc. (NFO). It ascertained potential cellular demand among non-business users only. It also conducted a mail survey of paging customers of operating subsidiaries of Ram Broadcasting in Seattle and eight other markets. *I.D.*, paras. 12-16.

15. Interstate's Market research was conducted by Compucon, Inc. and the Gilmore Research Group. Compucon's research was used to develop a cellular user profile, to forecast the number of cellular units expected to be in service in the Seattle market, and to project demand throughout the SMSA. Compucon used local research and resources (interviews with local market experts); it conducted no actual user survey. To verify Compucon's analysis, a public demand survey of potential business customers for cellular service was conducted by the Gilmore Research Group. This latter study found a high initial demand than did the Compucon research. (*I.D.*, at paras. 17-19).

16. Several market research studies were done on behalf of CMS. Claritas Corporation and Westat Inc. conducted two telephone surveys for CMS, one of the general population of Seattle and the other of Seattle paging customers. In addition, three telephone surveys were conducted for CMS, all using the same questionnaire. Graphic Scanning Corp., the parent of CMS, conducted two surveys of its paging customers in Seattle

and the general Seattle business population.[6] The third telephone survey was conducted by Westat to quantify subscriber interest and demand of private businesses at different monthly charges. (*I.D.* paras. 20-24).

17. The judge did not award any preferences under this issue because he found that the public need surveys and related research conducted by the applicants were based on incomplete analysis, as discussed below. He found that Interstate relied on a theoretical model which did not coincide with the results of the study which surveyed demand. The judge found AMCOM's demand showing to be flawed because in one of its survey categories projected cellular demand among all employees in certain fields on the basis of a survey conducted only among managers and supervisors. The second flaw the judge found was that about half of AMCOM's demand projection was not based on research, but an assumption that demand from sources not included in its survey would equal 0.5 percent of the total in its "all other employment" category. Third, while AMCOM's survey results determined that the principal users of cellular service in the initial years will be business users, it applied its conclusions to the full residential population in order to predict demand. This, the judge found, would result in artificially inflated traffic forecasts. The judge found CMS' market research to be subject to similar criticism, that is, that the underlying assumptions on which CMS relies have not been established. In addition, the judge concluded that there was no record support to substantiate CMS' claim that it used its research in arriving at its demand projections. (*I.D.*, paras. 66-70).

18. AMCOM argues that the judge erred by refusing to accept its forecasts of anticipated demand. AMCOM alleges it deserves a preference for its market research because among other things it had a demand study and a consumer interest study. It contends that its studies had no methodological or other errors while Interstate's and CMS' studies were seriously flawed.[7] Similarly, CMS alleges that its studies are not flawed and that it deserves the preference.[8] According to CMS, Interstate's studies also assume that businesses would be the primary market for cellular and that pagers most closely resemble the cellular market.

19. Upon review we find that the judge was correct in concluding no preferences are warranted under this issue. The judge properly found that the public need surveys and related research conducted by all three

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[6] Graphic also conducted two mail surveys similar to the telephone surveys employing the same questionnaire.

[7] In addition AMCOM charges it was error for the Judge not to allow it to cross-examine the sponsoring witness of CMS' market studies, denying it due process. *See* para. 59, *infra* for our resolution of this matter.

[8] CMS has also filed a petition to reopen the record alleging that the Commission has changed procedural standards for examining demand. *See* para. 60 for our resolution of this matter.

applicants were flawed and that no preferences should be awarded for this issue.

20. Interstate's demand assessment does not warrant consideration for two reasons. Interstate submitted two separate demand studies, which contradicted each other, and did not attempt to reconcile these differences or explain why one survey was relied upon over the other. In addition, the Compucon study utilized several assumptions in the forecast of cellular demand which were not explained or justified.[9] (*I.D.* paras. 17-19, 67). The Compucon study, which resulted in a smaller (i.e., more conservative) demand forecast, was used as the basis for Interstate's distribution of demand in designing its cellular system.

21. AMCOM's studies are also flawed. AMCOM calculated demand from users in two categories, "Industries and Occupations of Interest" and "all other employment". To predict demand in the "Industries and Occupations of interest category" it surveyed only managers, executives or sales and service personnel who spend large amounts of time outside their offices.[10] It then applied the interest found among them to everyone else in the category. The record supports the judge's conclusion that AMCOM provided no logical explanation of why demand among this highly selective group is indicative of overall demand.[11] In addition, in the "all other employment" category no research or surveys were conducted. It was assumed that demand would equal 0.5 percent.[12] Furthermore, while AMCOM surveyed business and its survey results determined that in the initial years the principal users of cellular service would be businesses, it applied its conclusions about them to the full residential population in order to predict demand. There is no evidence in the record to support the reasonableness of this approach.

22. Similarly, CMS' market research contains flaws. CMS did not establish and the record does not support the reasonableness of its underlying assumptions. CMS' exceptions on this issue are identical to the

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[9] For example, Compucon assumed without adequate explanation that the national mobile penetration rate and the paging industry growth rate can be applied directly to forecasts of cellular demand. (I.D., para 18).

[10] AMCOM Vol. III, Ex. D.-9.

[11] AMCOM found that 9.5 percent of its management sample would use cellular and projected from that survey that 9.5 percent of all employees in their companies would use cellular. We agree with Interstate that, "This would be similar to asking 10 Cabinet Secretaries whether they would be interested in having chauffered [sic] limousines, getting five favorable responses, and therefore assuming that 50% of all government employees would order chauffered [sic] limousines." Interstate Reb. Ex. 5 at 2.

[12] The I.D. states this figure as 5 percent. I.D. at para. 69. This appears to be a typographical error.

exceptions it raised in the *Chicago* and *Pittsburgh* proceedings.[13] We find the resolution of the issues there to be dispositive, and in agreement with the judge's analysis of flaws based on the record developed in this proceeding (*I.D.*, paras. 66-70).

23. *Ability to Accommodate Local Demand.* The judge found that AMCOM's initial system will have 11 cell sites and sufficient channel capacity to accomodate demand for 3,462 subscribers (180 channels). AMCOM's channel assignments are made on the basis of its demographic analysis and market surveys. (*I.D.*, para. 25-28). The judge found that Interstate's initial system will be constructed with nine cells and sufficient channel capacity (57 voice channels) to accommodate 949 subscribers during the first year of operation. Its channel capacity reflects its projection of the number of potential users in each cell, and its placement of cells was based on its market research and forecasts. (*I.D.*, paras. 29-31). With regard to CMS, the judge found that the applicant proposes to construct a 13 cell system which is expected to satisfy demand up to and including the fifth year of operation. Initially, it will operate its system in an onmidirectional mode, with multiple cell overlap, particularly in downtown Seattle. (*I.D.*, paras. 32-34)

24. The judge awarded Interstate a preference under this issue because he found that Interstate best demonstrated the ability to implement its plan. Although its projected demand is the lowest of any of the proposals, it proposed a system with adequate capacity to meet the demand and to anticipate and efficiently adapt its system during the initial year to accommodate a greater initial demand should it develop. The judge further concluded that the preference is not based on its projected demand (in this respect each applicant's projections were accepted for the limited purpose of determining the applicant' ability to accommodate projected demand), but rather because he found that Interstate can best meet the stated demand and anticipate and efficiently adapt its system during the initial year to accommodate a greater initial demand if it should develop. (I.D., Paras. 75-77).

25. The judge criticized CMS' system, finding that its proposal resulted in a potential for co-channel interference because of the close spacing of its cells. The judge further noted that CMS would be required to sectorize the majority of its cells in a way that may preclude the rapid

[13] CMS argues that the assumption of paging use as a precursor of cellular is reasonable, that its study of business users is unassailable because businesses will be the primary users of cellular and that it demonstrated a link between its market research and demand findings. For treatment of these issues, see *Chicago Final Decision*, para. 26 and *Pittsburgh Final Decision*, para. 21.

and inexpensive reallocation of channels from lightly used cells.[14] (*I.D.*, para. 72.)

26. The judge also found several flaws in AMCOM's system plan. AMCOM, according to the judge, relies on the unsubstantiated assumption that subscriber density would be uniform along the length of the system from cells 4-11 and that no cells in the group would be expected to encounter a disproportionately high channel demand. The judge found this to be inconsistent with the market research and found the resultant system to be one in which channel assignments are not correlated to areas of projected demand for service. The judge also concluded that AMCOM's initial frequency plan does not incorporate efficient system design principles. Instead of sectorizing as the system matures, AMCOM proposes to add cells and continue its initial omnidirectional transmission pattern with subdivided cells.[15] (*I.D.*, paras. 73-74).

27. Both CMS and AMCOM except to the judge's findings and conclusions. AMCOM alleges the judge's criticisms of its system are in error and that its system is qualitatively superior to those of the other applicants. AMCOM explains that, contrary to the judge's findings, its system does not contemplate uniform demand throughout the cells, but rather uniform growth of demand. Consequently, AMCOM claims that the judge's finding in this regard is erroneous. AMCOM also claims that the judge's conclusion that its frequency plan does not incorporate efficient design principles is without record support. Finally, AMCOM asserts it deserves a preference because it was the only applicant to make a firm commitment to wide area, toll free service.

28. CMS alleges that its system design is entitled to a preference because its expansion approach is more flexible. CMS further avers its system's layout follows a grid pattern; cells on a large primary grid and split cells taken from a smaller subdivision grid.[16] Thus, the judge's conclusion that its system would require substantial amounts of fine-tuning and reassessment as demand increases is without foundation. CMS also alleges that the judge's award of a preference to Interstate was in error, first, because Interstate underestimated demand and will not have adequate capacity to meet reasonably foreseeable demand; and second,

[14] According to the judge CMS' system would require substantial amounts of fine-tuning and reassessment as demand increases. I.D., n. 16.

[15] The judge concluded this nonstandard design is likely to require special and otherwise unnecessary hardware to implement and would not produce a system which is likely to evolve efficiently. (*I.D.*, para. 74).

[16] CMS excepts to the Judge's rejection of an amendment it offerred specifying the signaling frequency for cell 11. It argues that the omission of the signalling channel was clearly demonstrated to have been inadvertent by reference to other portions of the application. Since no decisional significance was attributed to the specific signalling channel, we find no reason to reverse the judge's decision.

because Interstate's computation of grade of service is contrary to standard industry practice.

29. After carefully reviewing the record and the arguments raised, we conclude that some of the judge's conclusions must be modified. First, we agree with AMCOM that the judge was in error in finding that its channel assignments are not correlated to areas of projected demand for service, resulting in disproportionately high channel demands in some cell locations. AMCOM has adequately explained its system design, demonstrating that its distribution of channels is not uniform among the cells and it will be capable of meeting its projected demand. We also are reversing the judge's conclusions at paras. 72 and 74 that AMCOM's and CMS' system are inefficient. The record does not indicate that CMS' or AMCOM's system design will significantly affect their ability to accommodate the expected demand. Furthermore, there has not been any demonstration of record that CMS' or AMCOM's systems will be unable to accommodate the demand in the initial implementation phase or subsequent years. We will discuss both system designs in more detail in connection with the expansion plan issue, at paras. 39 *et seq., infra.*[17] *See Pittsburgh Final Decision,* at para. 27.

30. Finally, we reject the arguments of AMCOM and CMS with respect to Interstate's proposals. They both argue Interstate's proposal is unreasonable since its demand projections are the lowest of the three applicants and are based on the assumption that the non-wireline carrier will capture only one-third of the market in its first year. Interstate's assumption that it will initially capture only one-third of the market demand for cellular is conservative and reasonable, in view of Interstate's explanation that a conservative estimate was used because of its concern about the impact of a wireline headstart. Similarly, Interstate's decision to plan its system for a lower estimated demand is reasonable. In view of Interstate's estimate of market demand, it would have been unreasonable for it to plan a larger system. In any event, Interstate's system design appears flexible enough to accommodate a larger amount of demand if it materializes.[18]

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[17] We are not persuaded by AMCOM's allegations that it deserves a preference because it proposes to provide wide area, toll free service. The cost of implementing the toll-free system may well exceed the toll charges avoided. In the absence of a detailed cost-benefit analysis, we must decline to award AMCOM a preference on this basis.

[18] We also find unpersuasive CMS and AMCOM's arguments that the traffic assumptions used by Interstate to calculate channel requirements were incorrect. There is no single Commission or industry standard concerning subscriber usage or holding time in the design or operation of cellular systems. In the absence of such a standard, we cannot agree that Interstate's assumption is erroneous. *See* Chicago Final Decision at n. 32. In any event, Interstate's assumption that 0.01 erlang of traffic per unit will be offered during busy hour, while lower than the assumption used in the conventional mobile

31. Because we have determined that the judge's criticisms of CMS' and AMCOM's proposal were not warranted, we are therefore reversing the judge's award of a preference to Interstate under this issue. The record supports a finding that all three applicants are capable of meeting the demand levels they predicted despite the flaws in their studies. None of the applicants, however, demonstrated convincingly that its distribution of demand was based on the results of its studies. Accordingly, we award no preference under this issue.

32. *Ability to Accommodate Demand for Roamer Service.*[19] All three applicants propose to offer service to roamers. The judge did not prefer any of the applicants because sufficient detail had not been provided about their roamer proposals. (*I.D.*, para. 78).

33. CMS and AMCOM except to the judge's conclusion that no preference should be granted. AMCOM argues that it should be preferred over Interstate because Interstate proposed to charge higher air time rates to roamers than to resident subscribers. AMCOM argues that it should be preferred over CMS because present technology does not allow CMS to provide the fully automatic roamer registration that it proposes. Similarly, CMS argues that it should be preferred because its proposal is more efficient for roamer service; only in CMS' system will a foreign subscriber be reached by dialing a single, unchanging local access number and then the subscriber's "home" cellular number on every visit to the system.

34. We affirm the judge's conclusion to not prefer any of the applicants for their roamer proposals. All of the exceptions address the treatment to be accorded roamers, and not the applicant's ability to accommodate the anticipated demand for roamer service. These arguments therefore are irrelevant to a comparison of the applicants on this issue. *See Chicago Final Decision*, at para. 31. The record also supports a finding that all of the applicants appear to be able to accommodate service to roamers in their systems. (I.D., para. 78). Accordingly, there is no ground for a preference to any of the applicants on this issue.

35. In summary, we have awarded Interstate a preference for its geographic area and population coverage. No applicant was preferred for its assessment of relative demand, or ability to accommodate local or roamer demand. Accordingly, we conclude that Interstate is preferred under issue (a).

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services (*see* Section 22.16(b)(3)(ii), appears to be reasonable. Therefore, the judge was correct in not awarding preferences to CMS or AMCOM for grade of service. *See Chicago Decision, supra* at n. 29.

[19] Roamer service is service to mobile units normally associated with another carrier.

Issue (b)

36. *Expansion plans.* This issue calls for a comparison of each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet increasing demand. *In Cellular Communications Systems*, 86 FCC 2d at 503, we indicated preference should be given to designs entailing efficient frequency use, including the applicant's plans with regard to cell splitting and additional channels, the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.

37. AMCOM's system will have cell sites and sufficient channels to accommodate first year demand. Channel addition will be used to reduce blocking when the system's grade of service deteriorates to .05. AMCOM does not anticipate a need to sector its cells during the first ten years. However, if subscriber distribution is non-uniform to the extent that AMCOM can no longer maintain grade of service in a densely populated cell with omnidirectional transmit, it will sector that cell. (*I.D.*, paras. 37, 38). AMCOM's general plans call for expansion by sectoring until it is no longer possible, and then expansion by cell subdivision on a sector transmit basis. (*I.D.*, para. 39).

38. CMS will construct its first year system with cells adequate to satisfy fifth year market demand. In the first year it will install only that equipment and distribute only those channels necessary to meet forecasted first-year demand. CMS' frequency plan was prepared for a fully mature, sector transmit fifth-year system and all 13 sites will operate in an omnidirectional mode. For the first five years, system capacity will be expanded by adding channels at the cell sites. This will be accomplished by adding frequencies, or cells will be subdivided to obtain frequency reuse. (I.D. paras 44-48).

39. Interstate's initial system consists of nine cells configured for omnidirectional transmission at all sites. During the first seven years of operation, Interstate anticipates subscriber capacity will be increased by adding channels at the original cell sites. Interstate presented a frequency plan outlining the anticipated frequency assignments by cells for each year up to and including the tenth year after the system is started. This plan reflects Interstate's intention to expand its system from the initial omnidirectional configuration, with no frequency reuse, to a sectorized cell transmit plan incorporating frequency reuse, and ultimately, (if necessary) cell subdivision. (*I.D.*, paras. 41-43).

40. The judge preferred Interstate on this issue because its expansion plan does not suffer from any inherent engineering defects. The judge found AMCOM's plan has a substantial risk of system hardware being installed at locations where it ultimately may not be needed. CMS'

proposal was criticized because it would require significant fine-tuning before implementation of its expansion plans, it violates the co-channel/adjacent channel reuse criteria, and it is inefficient. (*I.D.*, paras. 81-85).

41. AMCOM argues that the judge erred in failing to consider the ability of its system to expand to meet the demands of the real marketplace. AMCOM argues that it demonstrated that it expects growth to be relatively uniform in certain cells, that expansion in those cells would be accomplished by cell subdivision instead of sectorization and that this is entirely consistent with accepted cellular design principles. AMCOM avers there is no evidence to support the conclusion that its choice of expansion by cell subdivision will result in any "inefficiency" or substantial risk that system hardware would initially be installed at locations where it ultimately may not be needed. AMCOM concludes, given CMS' lack of a practicable expansion plan and Interstate's inherent shortage of capacity at any stage of development, that its system warrants a clear, substantial comparative preference.

42. CMS argues that the judge's findings and conclusions with regard to its system design and expansion plans are unfounded and mistaken. It contends that the separation criteria for sectorized re-use cells and omni-transmit cells mentioned in CMS' application were meant as planning guidelines; that there is no requirement of uniform cell spacing; and that the judge's conclusion that it would encounter co-channel interference based on fundamental principles of cellular design is without foundation. CMS avers that its system would experience no untoward intra-system interference using the carrier-to-interference ratio methodology. CMS concludes that its proposal deserves a preference for its superior spectrum efficiency and frequency re-use capability.

43. We agree with AMCOM and CMS that a number of the judge's findings and conclusions with respect to issue (b) are erroneous. First, as we recognized in the *Chicago Final Decision, supra,* at para. 41, and *Pittsburgh Final Decision, supra,* at para. 41, there is no fundamental principle of cellular design requiring that the spacing between cells be as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference. A cellular system not based on a uniform grid may require some fine-tuning in the course of expansion, but any cellular system will require a degree of adjustment, in response to unexpected propagation effects or usage patterns. In adopting its cellular rules and policies, the Commission sought to avoid imposing any rigid system design concepts, in order to permit applicants the flexibility (within certain limits) to design their systems in different ways. 86 FCC 2d at 505-509. CMS' design concept, while different from that utilized by other applicants, appears to be viable and consistent with our general requirements for system design. As we said in *Chicago Final Decision,*

at para. 41, we will not penalize CMS merely because it chooses not to follow the conventional wisdom. Nor will CMS' system be disfavored because it may require more fine-tuning than other systems before implementation of its expansion plans would be possible.

44. We also reverse the ALJ's conclusions that CMS' initial system shows a serious potential for co-channel interference and that the lack of uniformity in spacing requires that CMS sectorize the majority of its cells in a way that may well preclude the rapid and inexpensive reallocation of channels from lightly used cells. With respect to co-channel interference, there is no record evidence to support the judge's conclusions. The record does not indicate that CMS' initial configuration will suffer from intra-system interference. With respect to intra-system interference that may occur in later years, as CMS adds channels and splits cells, we do not believe that any comparative demerit is warranted. Some degree of intra-system interference is to be expected in any maturing cellular system. The effects of such interference can be managed effectively, because all of the potentially interfering transmitters are under the control of the same carrier. Most important, CMS' proposal would not prevent CMS from implementing its system, nor would it result in interference to any other system. We also vacate as unsupported by the record the judge's finding that if CMS were to reduce cell radii to satisfy the criteria for frequency reuse, the result would be a drastic reduction in CMS' coverage of its CGSA. *Pittsburgh Final Decision*, supra, at para. 41.

45. On the other hand, we reject CMS' argument that its system design is, in fact, superior to that of AMCOM and Interstate. CMS has not demonstrated that building penetration and service to portables in Seattle would be inadequate without its proposed depth of coverage. Accordingly, its proposal can be viewed simply as different from, not better than, the others. *See Pittsburgh Decision, supra* at para. 42.

46. We will also reverse the judge's findings that AMCOM's system is inefficient. There is no record support for this conclusion. As we stated above, we will not give a demerit for a system that merely appears to be different. We also disagree with the judge's conclusions at para. 81 that AMCOM's theoretical plan is not followed in Seattle. The record does not support this conclusion. Moreover, our review of the record shows that AMCOM has considered using sectorized transmit cells in later years. AMCOM Vol. II, Sec. II.

47. In view of the foregoing, we conclude that all of the applicants have set forth adequate expansion proposals. The record does not establish that any single applicant's expansion plan is clearly superior to the others. Therefore, we are reversing the judge's conclusion preferring Interstate, and conclude that no preferences will be accorded under this issue.

Issue (c)

48. This issue calls for a comparison of the nature and extent of the service proposed by each applicant, including the rates, charges, maintenance, personnel, practices, classifications, regulations and facilities. In *Cellular Communications Systems*, we indicated that this issue is not as significant as issues (a) and (b). 86 FCC 2d at 503. We also stated that while adequacy of base station and switching facilities might be an issue in some cases, we did not expect it to be a significant issue in general. Finally, we noted that personnel and practices would be significant to the extent that they affect an applicant's ability to implement its proposal. The judge gave CMS a preference for its proposed rates and charges but did not award any preference for the other elements of this issue.[20] We affirm, although we find the preference to be only slight.

49. *Rates.* The judge preferred CMS for its proposed rate structure (including its provisions for off-peak and special data transmission pricing) which will result in a more efficient and a more economical cellular usage than the rates proposed by either Interstate or AMCOM. (*I.D.*; paras. 49-53; 86-89.)

50. AMCOM excepts, alleging that its rates levels and structure are based on principles of economic efficiency and competition and the judge erred in ignoring the testimony of AMCOM's economist. CMS alleges it should also have been preferred for its rate levels.

51. We agree with the judge's findings that CMS' rate structure is to be preferred over AMCOM's and Interstate's. All three applicants' rate structures will encourage off-peak usage, ensuring efficient use of system capacity. However, CMS' unbundled rate structure, employing a much shorter billing increment, better serves to promote usage-sensitive cost based pricing. Therefore, a slight preference is warranted. See *Chicago Final Decision* at paras. 48-49; *Pittsburgh Final Decision* at paras. 51-52.[21]

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[20] CMS excepts to the judge's failure to award preferences for service offerings. The judge discusses some of the service offerings applicants propose in addition to basic service in paragraphs 49-53 of the *I.D.* All of the applicants propose to offer a variety of services in addition to basic service. While CMS proposes to offer more services than the other two applicants, no credit will be given because CMS failed to establish that these services will be offered in response to a demand for these particular services. Adding unnecessary "bells and whistles" to a cellular system does not give rise to a preference. *Chicago Decision* at para. 46; *Pittsburgh Decision* at para. 48.

[21] We reject CMS' and AMCOM's arguments they should have been preferred based on their rate levels. In the *Pittsburgh Final Decision* at para. 52 and *Chicago Final Decision* at para. 49, we upheld the judges' refusal to award preferences for rate levels because proposed rates may be of decisional significance only where an applicant has made an appropriate showing of the methodology used in the effectuation of its rate proposals. No such showing was made in this case. Accordingly, no comparative credit will be given for rate levels.

52. *Maintenance and Personnel.* The judge concluded that all three applicants in this proceeding established an acceptable management structure for their proposed systems. However, no preferences were awarded on the basis of any of these proposals, since none of the staffing and personnel proposals presented by the parties clearly enhances their ability to implement their proposals. Nor did the judge award a preference on the basis of any applicant's maintenance proposal. All propose some sort of routine maintenance and repair, as well as a continuous system of monitoring; no proposal was found to be significantly superior to the others. Finally, no comparative preference was accorded on the basis of the facilities proposed by any of the applicants. All three applicants have proposed technically acceptable facilities and the record clearly reflects the ability of all three to construct cellular systems technically capable of providing high quality cellular service. (*I.D.*, paras. 90, 91).

53. All three applicants except to the judge's conclusions regarding personnel and maintenance proposals. AMCOM alleges it should have been preferred because CMS' proposal is too general while Interstate's was deficient because it did not propose enough persons for maintenance.[22] CMS argues that its plan is superior because it will have access to the resources of its parent, Graphic Scanning Corporation, which possesses substantial cellular expertise, for personnel and maintenance. Interstate alleges it deserves a preference because it was the only one proposing a personnel plan providing substantial integration of local ownership in the day to day operations of the facility.[23] Finally, Interstate also alleges that the judge erred by failing to prefer its maintenance plan which provides for the use of direct technical employees and for a centrally located full-service maintenance shop.

54. We agree with the judge's conclusion that none of the applicants is to be preferred in these areas. As we stated in *Cellular Systems, supra*, personnel and practices will be significant to the extent they affect an applicant's ability to implement its proposal. 86 FCC 2d at 503. We also stated we did not expect maintenance proposals to present a significant issue in general. *Id.* On review of the record we find all three applicants set forth adequate personnel and maintenance proposals. Moreover, we cannot find that any of the proposals will measurably affect any applicant's ability to implement its system. Nor do we find that the maintenance proposals raise a significant issue. Accordingly, the judge's

[22] AMCOM further alleges the judge erred for failing to credit it for its major commitment to promotional activities. Advertising budgets are too speculative to be a basis for comparative evaluation in the cellular service.

[23] Gordon Kelley is the proposed General Manager of Interstate and the owner of Kelley's Radio Telephone, Inc., one of the companies that is a partner in Interstate. He is a fulltime resident of Seattle was born and raised there. Mr. Kelley will devote as much time as required (a minimum of 20 hours per week) to the management of the station.

decision will be affirmed and no preferences will be granted under these issues.[24] *See Chicago Final Decision, supra,* at para. 51.

55. *Practices.* CMS excepts to the Judge's failure to consider the comparative significance of CMS' plans for fostering minority and female communications enterprises. Graphic has agreed to invest $100,000 to fund the creation of at least three local minority and/or female controlled organizations in Seattle to engage in retail and service functions with respect to marketing CMS' services. (CMS D. EX. VII, P. 6). AMCOM also alleges it should have been preferred for its commitment to minority participation in cellular radio including the participation in AMCOM of Stellar, an entity owned entirely by minority individuals and minority-owned and/or controlled corporations which are involved in various facets of the communications and publishing industries.

56. Because the judge omitted mention of this we have examined it on review. Consistent with our prior decisions, we conclude that while commendable, no preferences or credits will be given for the type of minority programs offered by CMS and AMCOM. *Pittsburgh Final Decision,* at para. 53, *Chicago Final Decision,* at para. 52. Accordingly, no preferences can be considered on the basis of the personnel or practices issues designated for comparative hearing. Moreover, the Commission recently revisited the issue of minority preferences in common carrier technologies, and has found that no preferences should be awarded. *Cellular Mobile Systems of Tampa,* FCC 84-149, released June 8, 1984; *see also Cellular Lottery Decision,* 49 Fed. Reg. 23628 at paras. 78-79 (1984). Accordingly, AMCOM's arguments are rejected.

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[24] We disagree with Interstate that local ownership integration proposals fall within the designated issues. Under the policies stated above this would only be relevant if it demonstrably affects the applicant's ability to implement its proposal. Interstate has not demonstrated that a local owner/manager affects its ability to implement its proposal. The cases cited by Interstate in support of its argument are inapposite; they refer to other non-cellular common carrier services, where the designated personnel issue was broader than in the cellular orders ("personnel and practices are only significant to the extent they affect an applicant's ability to implement its proposals"). 86 FCC 2d at 503. The cases cited by Interstate, Contact, 19 FCC 566 (1954) Houston Mobilfone, Inc., 65 FCC 2d 848 (Rev. Bd. 1977), 78 FCC 2d 2067 (1980) (Decision on remand) Microband Corp. of America, 69 FCC 2d 525 (Rev. Bd. 1978), and Southwestern Bell Telephone Company, 47 RR 2d 561, 567 (Rev. Bd. 1980), are therefore inapposite. Our purpose in qualifying the personnel issue in cellular cases was to avoid endless litigation over minutiae having no relevance to implementation of the applicants' proposals. Therefore, no preferences will be awarded for these proposals. We also disagree with Interstate that it should be preferred for proposing a directly employed technical staff (as opposed to contracted-out) and a centrally located full service maintenance shop. There is no record support for a preference absent a showing that this in fact makes its proposal superior to the others.

Procedural Matters

57. The parties have raised on exception various procedural matters. Interstate alleges the judge applied incorrect legal standards in denying Interstate's petition to enlarge that requested designation of site availability issues.[25] The parties also allege the judge erred in denying their requests for cross-examination.

58. We find that the procedures used in this proceeding were fully consistent with our expedited hearing procedures, 89 FCC 2d at 90-94, the Administrative Procedure Act, Section 309 of the Communications Act and the requirements of due process. When we adopted those procedures, we explicitly left it to the judges to decide whether cross-examination was required to assure an adequate record. We conclude the judge's decisions denying cross-examination were not an abuse of his discretion, and an adequate record was developed in this case.[26]

59. CMS has filed a motion to reopen the record, seeking an opportunity to rebut certain conclusions in the *I.D.* that it says were based on evidence first submitted on rebuttal. CMS also wishes to address certain issues first raised in the *I.D.* These matters include the conclusion that CMS would suffer undue intra-system interference and the finding that a fundamental principle of cellular design requires uniform spacing between cells. With regard to each of these issues we have overruled the judge. Any prejudice that CMS might have suffered as a result of these rulings has therefore been removed. Accordingly, the motion to reopen the record will be denied. See *Chicago* and *Pittsburgh Decisions, supra.*

60. CMS has also filed a petition to reopen the record alleging denial of due process because the Commission did not give applicants prior notice that survey methodologies would be compared. CMS' petition will be denied. CMS had ample notice of the designated issues. In *Cellular System*, 86 FCC 2d at 502 we indicated the results of public need surveys would be considered. Clearly, consideration of results presupposes examination of the methodology.[27] Thus, CMS cannot now claim lack of notice.[28]

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[25] Interstate argues the judge should have used a "good cause" standard and not allowed CMS and AMCOM after designation, to substitute alternate transmitting locations in circumstances where adequate assurances of the availability of the original location were not secured.

[26] We need not address Interstate's argument regarding CMS' and AMCOM's site changes, *see* note 25, *supra*, in view of our decision herein to grant Interstate's application.

[27] In addition, Section 1.363 of the rules requires that all statistical studies offered in evidence in common carrier hearing proceedings be supported by a summary statement delineating the assumptions made and explaining the methodology used. This rule section by itself should have given CMS notice that the applicants' survey methodologies were subject to careful scrutiny.

[28] CMS argues that it had no notice of the decisional criteria and procedural burdens imposed on applicants concerning survey methodologies. CMS strains credulity by

61. Interstate has petitioned to amend its application to reflect the transfer by Western Telepage, Inc. (Western) of its one-sixth interest in Interstate to McCaw Communications of the Pacific Northwest, Inc. (McCaw). We accept the amendment, although we have not considered the amendment for comparative purposes in this proceeding. We also accept Interstate's amendment notifying us of its tentative decision to utilize different equipment than that specified in its application. Subsequently, on July 10, 1984, Interstate filed a Motion for Leave to amend its application to reflect the technical details and related information associated with the equipment change; we are accepting this amendment also. We accept Intertstate's allegation that the equipment change would not alter the configuration of the proposed system, and no comparative credit has been awarded based on the equipment originally proposed. Therefore, AMCOM's[29] June 18, 1984 Motion to Reopen the Record for the limited purpose of allowing the development of an evidentiary record with regard to the impact on Interstate's basic and comparative qualifications of its proposed substitution of equipment suppliers is denied.

Conclusions

62. Based on our review of the record in this case we conclude that Interstate deserves a preference overall under issue (a), based on its superior coverage of area and population. No applicant received a preference for its analysis of demand or for ability to accommodate local or roamer demand. CMS received a slight preference under issue (c) for its rate structure. The preference awarded to Interstate under issue (a) outweighs the slight preference awarded to CMS under issue (c). Accordingly, we conclude that on a comparative basis Interstate's application is superior to both AMCOM's and CMS' and the public interest, convenience and necessity will be better served by the grant of Interstate's application.[30] Therefore, the *I.D.* is affirmed, as herein modified.

63. Accordingly, IT IS ORDERED, that the application of Interstate Mobilephone Company, File No. 26148-CL-P-(9)-82 IS GRANTED[31] and the applications of American Mobile Communications of Washington and

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claiming to have lacked notice that survey methodologies would be compared. Its own rebuttal case contained an exhibit containing 18 pages of comparative analysis of survey methodologies. *See* CMS Reb. Ex. V.

[29] On July 2, 1984, AMCOM filed a petition for leave to amend its application to reflect a *pro forma* change in the ownership of cellular radio interests of the Western Union Telegraph Company. We accept the amendment although we have not considered the amendment for comparative purposes in this proceeding.

[30] AMCOM has petitioned the Commission to use a tie-breaker lottery in this case. In view of our finding that Interstate is the superior applicant in the Seattle market, we deny AMCOM's request.

[31] This grant is conditioned upon the permittee's obtaining the appropriate antenna structure clearances.

Oregon, File No. 26105-CL-P-(11)-82 and Cellular Mobile Systems of Washington, Inc., File No. 26182-CL-P-(13)-82 ARE DENIED.

64. IT IS FURTHER ORDERED, that the Motion to Reopen the Record and the Petition to Reopen the Record filed by Cellular Mobile Systems of Washington, Inc. ARE DENIED.

65. IT IS FURTHER ORDERED, that the Application for Review filed by AMCOM IS DENIED.

66. IT IS FURTHER ORDERED, that the Petition for Leave to File Supplement to Exceptions, filed by Cellular Mobile Systems of Washington, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

DISSENTING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

I must respectfully dissent from the comparative award of a cellular license in this case. Once again, the majority has strained to make a comparative decision on the basis of insignificant factual differences.

In this case the majority awards no preferences except for rates (awarded to CMS) and area and population (awarded to Interstate). The decision then concludes that the "preference awarded to Interstate [for area and population] outweighs the slight preference awarded to CMS [for rates]". Thus, after a pained and detailed search for differences between CMS and Interstate, the case comes down to the fact that CMS proposed to serve 94.4% of the Seattle area and Interstate proposed to serve 97.8% of the Seattle area.

I find these differences so slight and the effect on service to the public so negligible that I am unable to make a decision on the basis of the Commission's comparative criteria. Rather, this case presents another opportunity for a "tie-breaker" lottery, which the Commission explicitly sanctioned in the Pittsburgh and Chicago cellular proceedings.

Common Carrier, Accounting Regulations
Rules, Clarification of

Order established proper accounting for an antitrust judgment and clarified the accounting and disclosure requirements for the litigation costs and interest expense associated with the judgment. —*AT&T*

FCC 84-447

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

American Telephone and Telegraph Co., Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell and U.S. West — Accounting instructions for the judgment and other costs associated with the *Litton Systems* antitrust lawsuit.

ORDER

Adopted September 26, 1984; Released October 2, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT.

1. This Order sets forth specific accounting instructions for the judgment and other costs associated with the *Litton Systems* antitrust lawsuit against American Telephone and Telegraph Co. (AT&T). Its purpose is to resolve uncertainty as to the proper accounting for the judgment and to clarify the accounting and disclosure requirements for the litigation costs and interest expense associated with this case.

2. On January 16, 1984, the United States Supreme Court denied *certiorari* in *American Telephone and Telegraph Company* v. *Litton Systems Inc.*, No. 82-2128 (Jan. 16, 1984), leaving standing jury awards exceeding ninety million dollars. These awards were trebled to $276,774,729 and entered by the United States District Court for the Southern District of New York on June 30, 1981 (*see* 568 F. Supp. 507 (S.D.N.Y. 1983) and 700 F.2d 785 (2d Cir. 1983)). The total amount of the judgment including accumulated interest is reportedly $340.8 million.

3. On February 6, 1984, the Common Carrier Bureau sent letters to AT&T and each of the Regional Bell Operating Companies (RBOCs),[1] wherein the Bureau proposed that the costs of the judgment, including litigation costs, should be charged to account 370, "Extraordinary income charges," a below-the-line account. The Bureau asked the carriers to submit supporting rationale if they believed that all or part of these costs should be charged to other accounts. All parties responded that (1) the judgment should be charged to account 375, "Delayed income charges," a below-the-line account; (2) the litigation costs were charged as incurred to accounts 664, "Law department," 665, "Other general office salaries and expense," and 671, "Operating rents," all above-the-line accounts, and should not be reclassified; and (3) the accumulated interest should be charged to account 336, "Other interest deductions," a below-the-line account with special ratemaking treatment (for purposes of calculating the average cost of debt in the rate of return calculation).

4. The letters to the carriers did not specifically address the treatment of the accumulated interest expense. We agree with the carriers that the interest is properly chargeable to account 336, which provides for recording interest deductions not provided for elsewhere and specifically lists interest on claims and judgments as an includable amount. 47 C.F.R. §31.336. In order to assure adequate disclosure; however, we are requiring that the cumulative amount of interest recorded in account 336 for this case be reported in a note to Schedule 11 in Annual Report Form M for 1983. The letters to the carriers did indicate that the costs of the judgment and associated litigation costs should be charged to account 370. After carefully reviewing this matter, we have decided to require the carriers to reclassify the litigation costs and the cost of the judgment to account 370.

5. *The judgment.* In support of using account 375 for the judgment, the carriers argue that under normal circumstances the judgment would be recorded in account 669, "Accidents and damages."[2] They claim in this case, however, that the judgment is a delayed item related to 1981 when it was first rendered and that, because it would seriously distort account 669 for the current year, it should be recorded in account 375 in accordance with the provisions of Section 31.01-5(b).[3] We do not agree with the

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[1] The seven Regional Bell Operating Companies referred to as RBOCs are Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis, Southwestern Bell and U.S. West.

[2] Section 31.669 states:

> This account shall include expenses, not provided for elsewhere, on account of persons killed or injured and property of others damaged in connection with the company's telephone operations.

[3] Section 31.01-5(b) states:

> If the delayed item would seriously distort the current accounts, it shall be credited

carriers' contention that this is a delayed item, nor do we agree that it would be charged to account 669 if not delayed.

6. The only point made by the carriers in support of treating the judgment as a delayed item is that the judgment was rendered in 1981. We note, however, that the carriers, at best, regarded the judgment as a contingency and therefore did not record it as a liability in 1981 (see AT&T's *Annual Report to Stockholders* for 1981). In fact, the carriers apparently considered this to be such a minor contingency that they did not report this item in the notes to Annual Report Form M in either 1981 or 1982 as would have been required for material contingencies under the provisions of Section 31.1-17. We conclude, therefore, that the carriers contemplated no basis of accountability for the judgment until the appeals process was completed and the matter was finally adjudicated. Accordingly, we conclude that this is not a delayed item applicable to 1981 but is instead a current period item applicable to 1983.

7. The major issue raised by the carriers' comments, however, is not whether this cost should be recorded in account 375 but is, instead, whether it should be recorded in account 669 as the carriers contend or in account 370 as indicated by the Bureau's letters. Since account 370 is provided specifically for recording extraordinary items, it has no normal balance to be distorted even if an item to be recorded therein is determined to be delayed. Thus, an account 370 item would not be recorded in account 375 regardless of its delayed status.

8. The carriers' rationale for the use of account 669 to record the judgment rests primarily on four main points:

(1) That lawsuits are a recurring fact of life in operating a business, and, hence, settlements of lawsuits or damages are a part of the ongoing operations of the business;

(2) That the definition of property is not limited to the damage of physical property but instead includes other types of property such as intangibles of a going business or the ability of a business enterprise to produce revenues;

(3) That account 669 was used to record settlements in two previous antitrust cases, *Carterfone* settled in 1969 for $480,000 and *Wyly/DATRAN* settled in 1980 for $50,000,000;[4] and

(4) That requiring the carriers to record the judgment in account 370 would deny them the opportunity of seeking recovery of these costs in rate proceedings.

9. We agree generally that lawsuits are not uncommon in operating a business and that companies must defend themselves against charges brought against them. We do not agree, however, that being found guilty

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to account 365, "Delayed income credits," or charged to account 375, "Delayed income charges," as appropriate.

[4] *Wyly Corp.* v. *American Telephone & Telegraph Co.*, Civil Action No. 76-1544 (D.D.C.); *Carter* v. *American Telephone & Telegraph Co.*, Civ. A. No. 3-1294 (N.D. Tex.).

of violating a statute should be regarded as a routine part of operating a business. Indeed, we believe that such a finding raises a serious question as to the allowability of the costs associated with such cases for ratemaking purposes, particularly the cost of the penalty imposed by the court. In this regard, account 370, which is used to record costs not ordinarily recognized for ratemaking, specifically provides that "penalties and fines for violations of statutes" shall be recorded therein. In our view, this provision of account 370 clearly describes the judgment against AT&T in the *Litton* case.

10. Furthermore, we find no merit in the carriers' contention that the judgment in the *Litton* case represents property damage that should be recorded in account 669. The provisions of account 669 clearly indicate that the costs to be recorded therein are costs associated with personal injuries and damage to physical property resulting from accidents. Moreover, Section 31.669 provides for the use of that account only for expenses not provided for elsewhere. In our view the penalty imposed as a result of the judgment in the *Litton* case is clearly provided for in account 370.

11. We have also considered the carriers' reliance on precedents in the *Carterfone* and *Wyly/DATRAN* cases as a basis for recording the *Litton* judgment in account 669. We note in this regard that the payments in those cases were settlements rather than judgments and thus were not as clearly provided for under the penalties and fines provision of account 370. Nevertheless, we believe that account 669 is, at best, of questionable propriety even for settlements. In fact, in Docket No. 79-19, *Litigation Expenses*, 92 FCC 2d 140, 146 n.7 (1982), the Commission expressed doubt as to the propriety of account 669 for antitrust settlements. It stated as follows:

> Account 669 includes expenses. . . "on account of persons killed or injured and property of others damaged in connection with the company's telephone operations" and, specifically, amounts paid in settlement of personal injury or damage claims. Settlements of antitrust suits are not specifically mentioned as falling within Account 669. Because it is unclear whether this account should include settlements of antitrust suits, we will instruct the TIAG involved in revisions to the USOA to consider this issue. However, we note that penalties and fines paid on account of violations of statutes would be reported in Account 370 (Extraordinary income charges), 47 CFR 31.370, containing nonrecurring costs which are not includable for rate purposes.

Based on the foregoing, we are not pursuaded that AT&T's past use of account 669 to record settlements in any way supports the use of account 669 for the *Litton* judgment.

12. Finally, the carriers' contention that requiring them to record the judgment in account 370 would deny them an opportunity to recover the cost in rate proceedings is incorrect. The accounting classification of an

item is not the final determinant of the ratemaking treatment. Any item of cost recorded in nonoperating (below-the-line) accounts can be identified by a carrier during a rate proceeding and included in rates if the carrier makes a positive and complete showing and the regulatory commission agrees that the cost should be allowed.

13. *Litigation costs.* The litigation costs associated with this case were properly recorded in operating expense accounts as incurred in accordance with the Commission's accounting rules. The Bureau requested reclassification of these costs to account 370 to highlight them and to assure that they are considered in future rate proceedings.

14. There have been several indications in the past that the litigation costs associated with antitrust cases would be reviewed and questioned in future rate proceedings and that the outcome of the litigation may have a bearing on the allowability of these costs. On June 21, 1976, AT&T was requested to maintain an accounting of all expenses incurred in defense against the *Litton* antitrust suit, and to file quarterly reports of those costs with this Commission.[5] Later, on February 14, 1979, this Commission adopted a *Notice of Inquiry* into the policy to be followed in deciding whether and to what extent litigation costs should be allowed as reasonable expenses in connection with common carrier rate proceedings. *Common Carrier Litigation Expenses,* Docket 79-19, 70 FCC 2d 1961 (1979) (the NOI). A question raised in that NOI was whether the allowance or disallowance of litigation expenses should be based upon the success or failure of the litigation. Ultimately, the Commission concluded that tariff and rate case review mechanisms provide suitable forums for challenging the recovery of litigation costs in rates, and it assigned the responsibility of determining whether more detailed accounts are needed for litigation expenses to the Telecommunications Industry Advisory Group (TIAG) which is involved in rewriting the Uniform System of Accounts for telephone companies. Finally, other Federal regulatory agencies have disallowed litigation costs for unsuccessful cases involving violations of statute. For example, the Civil Aeronautics Board in a *Final Rule* adopted October 4, 1979 (Regulation ER-1153) (14 C.F.R. 241.14), required that litigation costs incurred in the unsuccessful defense of an employment discrimination suit or in securing a compromise settlement or consent decree shall be recorded in a nonoperating expense account and disallowed for ratemaking purposes.[6]

15. We have considered carefully the arguments on both sides of this question, and we have decided to require reclassification of the litigation

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[5] Letter to Robert N. Flint, Vice President and Comptroller, AT&T, from Chief, Common Carrier Bureau, dated June 21, 1976.

[6] The Civil Aeronautics Board based its rulemaking on a Supreme Court decision that such costs were not allowable for setting rates. [*NAACP* v. *FPC*, 425 U.S. 662 (1976)].

costs for the *Litton* case to account 370, "Extraordinary income charges." We rely in part on the decision of the Supreme Court in *NAACP v. FPC, supra* note 6. In that case, the Court said that the FPC should disallow costs to the extent that they are "demonstrably the product of a regulatee's discriminatory employment practices [in violation of law]." The Court went on to say:

> To the extent that [back pay] and other similar costs, such as attorney's fees, can be or have been demonstrably quantified by judicial decree or the final action of an administrative agency charged with consideration of such matters, the Commission clearly should treat these costs as it treats any other illegal, unnecessary, or duplicative costs. 425 U.S. at 668.

The litigation costs incurred by AT&T as a result of its unsuccessful defense in *Litton* "are demonstrably the product of a regulatee's violation of federal statute," 425 U.S. at 666, and they are readily quantifiable because they have been identified through accounting requirements imposed by the Common Carrier Bureau since 1976.[7]

16. To effectuate this decision, we will require AT&T and the BOCs[8] to charge the entire amount (approximately $67 million) in 1984 to account 370 and credit the operating expense accounts in which the costs were originally recorded. We will not now initiate a separate proceeding to determine the degree to which these expenses were recovered in rates between 1976 and the present. In the next general interstate and exchange access tariff filings by AT&T and the BOCs, we will examine these expenses to the extent that the carriers seek to avoid the ratemaking impact of this reclassification upon their revenue requirements. Because our accounting classification is not the final determinant of ratemaking treatment (see para. 12, *supra*), the carriers will have the opportunity to demonstrate that portions of the litigation costs should be absorbed by interstate ratepayers.[9] For example, litigation expenses that can be attributed specifically to the defense of counts on which AT&T was exonerated may be transferred back into the revenue requirement upon a proper showing by the carriers.

17. We emphasize that the accounting classification adopted here applies only to cases within the framework of *NAACP v. FPC.* and only to the costs attributable to the interstate jurisdiction. There are pending numerous antitrust cases as well as cases that have already been settled,

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[7] Letter of June 21, 1976, from Chief, Common Carrier Bureau to the Vice President and Comptroller, AT&T.

[8] Under the terms of the Modification of Final Judgment, the RBOCs are contingently liable for portions of the *Litton* judgment and litigation expenses in proportion to the net book value of assets transferred at divestiture. *See* United States v. Western Electric Co., Inc., 569 F. Supp. 1057, 1069-74 (D.D.C. 1983).

[9] The total cumulative litigation expenses for this case should be reported in a note to Schedule 11 in Annual Report Form M for 1984.

most notably the case that resulted in the Modification of Final Judgment. We take no position now on the accounting treatment of the settlement amounts or the associated litigation expenses. Should the TIAG decline to submit recommendations on these issues, we will initiate a proceeding to deal with them. If the TIAG does offer recommendations, we will, of course, consider those recommendations. In the interim the carriers may charge the litigation costs to an operating expense account—*e.g.*, 664—or they may enter the expenses in a deferral account—139—pending the outcome of the affected litigation and further consideration by this Commission of settlements.

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 220(a), that the judgment and the litigation costs in the *Litton Systems* antitrust case are to be charged to account 370, "Extraordinary income charges" to be reflected in the books of account for 1984.

19. IT IS FURTHER ORDERED, pursuant to Section 219 of the Communications Act of 1934, as amended, 47 U.S.C. 219, that the carriers shall revise their 1983 Annual Report Forms M, Schedule 11, as indicated in paragraph 4, and file their 1984 Annual Report Forms M to reflect the accounting and reporting requirements prescribed herein.

20. IT IS FURTHER ORDERED, pursuant to Section 220(i) of the Communications Act of 1934, as amended, 47 U.S.C. 220(i), that the Chief, Common Carrier Bureau shall cause a copy of this *Order* to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Interstate
Message Telecommunications Service
Tariff, Investigation
Tariff, Schedule
Wide Area Telecommunications Service (WATS)

Proposed tariffs filed to bring AT&T's Long Distance Message Telecommunications Service and Wide Area Telecommunications Service, its switched interstate services, into compliance with divestiture of Bell System and to reflect the impact of exchange carriers' access tariffs.
—*AT&T Communications*
CC Docket No. 83-1145

FCC 84-291

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Investigation of Access and Divestiture Related Tariffs	CC Docket No. 83-1145 Phase II, Part 2
AT&T Communications	Transmittal No. 1
Tariff F.C.C. No. 1 Long Distance Message Telecommunications Service	
Tariff F.C.C. No. 2 Wide Area Telecommunications Service	

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1984; Released: August 3, 1984

BY THE COMMISSION:

1. On October 3, 1983, American Telephone and Telegraph Company (AT&T or ATTCOM) filed the above captioned tariffs with a scheduled

effective date of January 1, 1984. These proposed tariffs were filed to bring AT&T's Long Distance Message Telecommunications Service (MTS) and Wide Area Telecommunications Service (WATS), its switched interstate services, into compliance with the divestiture of the Bell System[1] and to reflect the impact of the exchange carriers' access tariffs. By a Memorandum Opinion and Order in Docket No. 83-1145, FCC 83-470, released October 19, 1983, *recon. denied*, FCC 83-568, released December 29, 1983, we suspended Tariffs 1 and 2 until April 3, 1984, and commenced an investigation as to their lawfulness. Comments on these proposed tariffs were filed on December 5, 1983, and replies were filed on January 6, 1984.[2] In a subsequent order in CC Docket 83-1145, FCC 84-106, released March 28, 1984, Tariffs 1 and 2 were further suspended until June 1, 1984, thus extending them to the maximum statutory suspension period of five months under Section 204(a) of the Communications Act, 47 U.S.C. §204(a) (the Act).[3]

2. On May 15, 1984, the Commission released a Memorandum Opinion and Order in Docket No. 83-1145, Phase I, and CC Docket No. 78-72, Phase I, FCC 84-201 (*Cost Order*). In this order we examined two interrelated areas affecting ATTCOM's MTS/WATS tariffs. First, we concluded that the local exchange carriers' cost support materials for their interstate switched access service tariffs required that those carriers file reduced switched access service rates. These switched access service tariffs became effective on May 25, 1984. We also concluded that AT&T had overstated its projected 1984 MTS/WATS costs and had understated its projected 1984 revenues for these services. Based on this analysis we prescribed the 6.1 percent across-the-board MTS/WATS rate reduction.

3. This prescription was implemented in ATTCOM's existing MTS and WATS tariffs, (Tariffs F.C.C. Nos. 263 and 259), but applies equally to any successors. The ATTCOM Tariffs 1 and 2 must therefore be revised to conform[4] if ATTCOM wishes to use them to replace Tariff F.C.C. Nos. 259 and 263. In the October 3 filings, ATTCOM proposed some significant modifications in rate relationships, (*e.g.*, differing reductions for some

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[1] United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[2] A list of commenting parties appears in Appendix B. In addition, numerous individuals and other businesses filed comments on the issues addressed in our May 15, 1984 *Cost Order, infra.*

[3] Pursuant to Special Permission No. 84-295, granted May 31, 1984, ATTCOM deferred the effective dates of Tariffs F.C.C. Nos. 1 and 2 from June 1 to July 1, 1984.

[4] ATTCOM had proposed a greater than 6.1 percent rate reduction overall in those tariffs, based on switched access rules and provisions which have since been changed. Most importantly, the delay in residential customer line charges has resulted in higher rates for switched access. The *Cost Order* does not preclude ATTCOM from offering further MTS and WATS rate reductions. Such reductions must, however, be based upon actual effective access tariffs.

rate bands and services) and a 75 cent charge for interstate directory assistance (DA) with up to one free call. Virtually all of the comments concerning these tariffs submitted in the course of this investigation addressed those aspects of the filing. All such comments have been addressed in or made moot by the *Cost Order*, with its prescription of an initial across-the-board rate reduction and a 50 cent DA charge with two free calls per month. Accordingly, we do not reach or consider those issues here.

4. Our review of ATTCOM's proposed Tariffs 1 and 2 and the remaining comments not yet addressed reveal a number of other problems regarding the terms of particular tariff provisions and regulations which remain unresolved and which must be rectified before Tariffs 1 and 2 can be allowed to replace Tariffs 259 and 263. In this order, we examine these issues in a section-by-section review of the tariffs similar to that undertaken in the access charge tariff orders, issued by the Commission and Common Carrier Bureau[5] according to the same general standards of review required by the Act and our Rules. This review appears in Appendix A of this order. In general, we conclude that Tariffs 1 and 2 can be allowed to become effective, provided that necessary revisions are made to explain, justify, revise or delete provisions which are vague, inconsistent, and unclear in violation of Section 61.55 of our Rules, 47 C.F.R §61.55, or in conflict with policies developed and expressed in our access charge and other orders. For example, we have found numerous instances where definitional terms or other tariff provisions regarding non-recurring charges for related maintenance, engineering and administrative functions appear to overlap. Thus, MTS and WATS services will continue to be offered under existing AT&T Tariffs 263 and 259 until such time as ATTCOM chooses either to transfer the current provisions in those tariffs to new ATTCOM Tariffs 1 and 2 or to file revised Tariff 1 and 2 provisions in accordance with the material analyzed in Appendix A. Transfer of existing MTS/WATS tariff provisions into new Tariffs 1 and 2 would not involve any material substantive changes, and public comment would appear unnecessary, and we would entertain a request to file such changes on one day's notice. However, to the extent ATTCOM proposes revisions to existing MTS/WATS provisions which involve modifications to matters addressed in previous orders in this proceeding, it must do so in a separate filing which would be subject to further comment and review. Likewise, if ATTCOM files revised Tariff 1 and 2 provisions and/or

[5] Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase I, FCC 84-51, released February 17, 1984; (*ECA Tariff Order*); Mimeo 2802, released March 7, 1984; (Common Carrier Bureau) (*Non-ECA Tariff Order*); and FCC 84-188, released April 27, 1984. (*Second ECA Tariff Order*).

supporting materials in accordance with the material analyzed in Appendix A, those revisions will also be subject to further public comment.

5. Our review of ATTCOM's Tariff F.C.C. No. 2 revealed some provisions which could appear to place unjustified restrictions on WATS service. Some of these provisions we address in the section-by-section analysis contained in Appendix A to this Order. Other provisions relate to issues, such as the question whether access lines are or should be considered dedicated, which are part of our ongoing WATS investigation or Joint Board proceedings. In general, we do not prejudge these matters here although in some cases we have requested additional information.

6. One additional issue concerns the listing of Connecting Carriers[6] on page 11 of the proposed MTS tariff and page 9 of the proposed WATS tariff. Both tariffs cross reference ATTCOM proposed Tariff F.C.C. No. 6 (Rate Centers) for this list. Under Transmittal No. 46, dated March 2, 1984, ATTCOM filed revisions in Section 7 of proposed Tariff F.C.C. No. 6 to become effective April 3, 1984, subsequently deferred by ATTCOM to July 1, 1984, providing for a list of telephone companies which it states have been identified as Connecting Carriers in services offered by ATTCOM under proposed Tariffs F.C.C. Nos. 1 through 7. The filing was made under authority of Special Permission No. 84-87, which waived the requirements of 47 C.F.R. §61.59, and included a list of 126 telephone companies. No further revisions have been made to this list of connecting carriers. Tariff F.C.C. No. 6 would replace, in part, AT&T's currently effective Rate Centers Tariff, F.C.C. No. 274, which contains a list of over 1300 telephone companies as connecting carriers. ATTCOM has offered no explanation as to why the new list of Connecting Carriers in proposed Tariff No. 6 is so small in number compared to the currently effective list. Section 61.55 of our Rules requires the listing of all Concurring, Connecting and other Participating Carriers in tariffs filed with this Commission. Further, Section 203 of the Act, 47 U.S.C. §203, requires the issuing carrier to publish schedules showing all charges for itself and its Connecting Carriers. Absent the listing of a Connecting Carrier in the interstate carrier's tariff, it can be argued that there is no rate lawfully on file for interstate or foreign communications originated from customers served by the Connecting Carrier. In a separate Order adopted today we conclude that proposed ATTCOM Tariffs F.C.C. Nos. 3 and 6 are presently unlawful.[7] If ATTCOM wishes to alter the list of connecting

[6] For purposes of these tariffs, Connecting Carriers are defined in Sections 3(u) and 2(b) of the Act, 47 U.S.C. §§153(u) and 152(b). *See also*, Section 61.15 of our Rules, 47 C.F.R. §61.15.

[7] Accordingly, since proposed Tariffs 3 and 6 have been found unlawful and returned to ATTCOM, all references to Tariffs 3 and 6 must be deleted from Tariffs 1 and 2.

carriers in its MTS or WATS tariffs, or in its Rate Center tariff, it should provide justification for the change.

7. ATTCOM may refile these tariffs on 45 days' notice. With any new filing, ATTCOM should supply a side-by-side analysis of new provisions submitted in response to this order. Also, ATTCOM should submit the justification of the various provisions requested here in the modular format used in Appendix A. Where possible, we have identified multiple tariff sections involving similar or related issues. However, ATTCOM should ensure that all revisions and explanations submitted in response to the concerns raised here are consistent throughout each tariff and with related provisions in other ATTCOM tariffs as well. Those parties commenting on such a new filing should likewise follow that modular format.

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 203, 204(a) and 205(a) of the Communications Act, 47 U.S.C. §§154(i), 154(j), 201, 202, 203, 204(a) and 205(a), that the tariff material submitted under the transmittals referenced above is unlawful to the extent indicated herein.

9. IT IS FURTHER ORDERED, that Sections 61.58, 61.59 and 61.116 of our Rules, 47 C.F.R. §§ 61.58, 61.59, and 61.116, are waived for the purposes of refiling these tariffs on 45 days notice and for filing necessary supplements.

10. IT IS FURTHER ORDERED, that Section 61.74 of our Rules, 47 C.F.R. §61.74, is waived to the extent required to file tariff revisions implementing this order.

11. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order is effective upon adoption.

12. This order is exempt from the provisions of the Regulatory Flexibility Act, 5 U.S.C. §§601 *et seq.* It involves a rule applicable to particular rates and practices relating to such rates within the meaning of the exemption contained in 5 U.S.C. §601(2).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendices A&B-may be seen in FCC Docket Branch, Washington, D.C., Room #239.

Financial Qualifications
Misrepresentation, Financial Qualifications
Remand

Proceeding remanded to explore allegations of misconduct relating to financial qualifications.
—*California B/Cing Corp.*
BC Docket No. 80-698

FCC 84R-60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
California Broadcasting Corporation Ventura, California	BC Docket No. 80-698 File No. BPCT-790130LP
Channel Islands Television Corporation Ventura, California	BC Docket No. 80-699 File No. BPCT-790130LQ
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 1984; Released: August 30, 1984

BY THE REVIEW BOARD:

1. The Board has before it the exceptions (and related pleadings) filed pursuant to an Initial Decision, FCC 84D-21 (*I.D.*) issued in the above-styled proceeding on March 29, 1984 by the presiding Administrative Law Judge Byron E. Harrison (ALJ). In addition to these pleadings, it has, of course, the voluminous record compiled at and attending the hearing, and it has also heard oral argument by the parties, California Broadcasting Corporation (CBC) and Channel Islands Television Corporation (CITC), on July 27, 1984.

2. In brief, the *I.D.* found CITC to be financially unqualified[1] and further found it disqualified based on, *inter alia*, the "false, evasive and contradicted testimony," and the "misrepresentations" made by 50.1% CITC principal, Ralph Andrews, in filings and testimony relating to Andrews' and CITC's finances.[2] Accordingly, the award went to CBC.

3. Although the ALJ added the ultimately disqualifying financial issues against the CITC applicant and examined the facts adduced thereunder in a manner that can be described only as exhaustive, *see I.D.*, paras. 7-107; Concls., paras. 1-34, he rejected the petitions of CITC to add financial and related candor issues against its opponent, CBC. *See, e.g. Memorandum Opinion and Order*, FCC 82M-3046, released October 4, 1982 (ALJ) (rejecting CITC Sixth Petition To Enlarge Issues Against CBC, filed July 1, 1982). Apart from disputing the ALJ's findings anent Andrews and CITC, CITC's exceptions to us are devoted exclusively to an attack on the ALJ's refusal to grant its Sixth Petition.[3] Whereas we are exceedingly reluctant to remand any completed hearing for still further evidentiary proceedings - hoping, instead, to resolve any remaining uncertainties through reasonable inferences to be drawn from the existing record - we have remanded where a day or so of adversary hearings would be hugely superior to an eon of "disembodied collegial intellection" over murky factual terrain. *See, e.g., Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360, 1362 (Rev. Bd. 1983). As distilled hereinbelow, we believe that this case demands an evidentiary exploration of many of the substantial and material questions raised in CITC's Sixth Petition and are of the reluctant conviction that this case cannot be decided equitably by the Board without the benefit of such further, limited hearings. Here is why.

4. CITC's exceptions argue that its "Sixth Petition demonstrated that CBC has been engaged since filing its application in this proceeding in a continuous course of conduct designed to mislead the Commission concerning both CBC's financial qualifications and CBC's various efforts to misrepresent to the Commission material facts concerning those qualifications."[4] The allegations of that Sixth Petition cumulatively build upon many of the basic charges submitted in CITC's Third Petition To Enlarge, which it had filed on July 10, 1981, and which asserted that CBC had grossly overstated its financial resources as well as those of another company wholly owned by 100% CBC principal, Harry L. Keiffer; that is, A&K Developments, Inc. (A&K), a California real estate development

[1] *I.D.*, Concls. paras. 34, 50.
[2] *See, e.g., I.D.*, Concls., para. 16.
[3] CITC Exceptions at 36 *et. seq.*
[4] CITC Exceptions at 36-37.

firm.[5] The escalating conflagration over the CBC and A&K finances evolved as follows.

5. CBC's instant television station application, filed in January 1979, estimated construction and first year operating costs of $2,635,384.[6] CBC proposed to finance those costs with a $100,000 stock subscription from Keiffer; a $1 million line of credit from Keiffer's A&K real estate company; and a $1.5 million line of credit from the Bank of Indio.[7] It also relied on an equipment lease. To obviate any question as to A&K's underlying ability to loan the $1 million to CBC, the applicant concurrently filed an A&K financial statement dated November 30, 1978. The A&K statement listed as current assets two tracts of development land purportedly worth a combined total of $2,046,000.[8] However, the two tracts of land, located in the so-called "Lemonwood Tract" of Lancaster, California, had been purchased for only $376,000 just three months

[5] The ALJ had denied CITC's Third Petition by *Memorandum Opinion and Order*, FCC 81M-3186, released October 8, 1981 (ALJ). The Broadcast Bureau (now Mass Media Bureau), which had opposed the Third Petition, later reversed its prior views and strongly urged grant of the Sixth Petition. *See* Broadcast Bureau's Comments On Sixth Petition To Enlarge Issues Against CBC. It did so based on the "probable decisional significance" and "substantial public interest importance" of the matters raised. *Id.*, at 2 n. 1 (*citing* 47 C.F.R. §1.229(c)).

[6] CITC Sixth Petition at 8.

[7] *Id.* On March 1, 1979, CBC amended its finances to withdraw reliance on the $1.5 million from the Bank of Indio and increased its reliance on A&K to $2.5 million. *Id.*, at 17-18. It later withdrew its reliance on A&K in lieu of a purported loan of $1.7 million from the Bank of Beverly Hills. *See infra* para. 6. CITC's Sixth Petition asserted that the withdrawn Bank of Indio commitment had been a sham because (a) that bank, by law, was limited to $300,000 loans to any single entity, *id.*, at 14-16, 159-160; and (b) the bank's policy was to make no loan in which it did not have a 50% interest (as against other participating institutions) as well as an absolute loan limit of $600,000. CITC Exceptions at 43-44. The Bank of Indio loan letter had been signed by its then-President, J. Albert White, a figure in this case whose moving shadow penetrates the later-repudiated loan commitment of the Bank of Beverly Hills. That second bank's letters emerged, then submerged, under circumstances of as much potential interest to the FDIC as the FCC. *See infra* para. 8 and n. 29. It is reported by CBC that Keiffer and his wife owned 300 shares of the Bank of Indio at the time White was its president. CITC Sixth Petition at 16**.

[8] CITC Sixth Petition at 9. More specifically, Note 2 of the November 1978 A&K financial statement listed the assets as: Tract 34513 -"67 lots" with a purported value of $737,000 and Tract 31357 "119 lots" with a purported value of $1,309,000. *Id.* The 1978 A&K financial statement further claimed (*id.*):

> A&K has the largest inventory of ready to build lots in Lancaster and has standing offers to sell these lots at the above stated market prices—all cash at the close of a 45 day escrow.

While that A&K financial statement showed $547,026 in cash, it also reported liabilities of $2,494,845. *Id.*, at *. In a July 1980 amendment, CBC increased the purported value of the two tracts to $2,323,000. CBC Reply To Exceptions at 6.

earlier, in August 1978, from Larwin Developments, Inc., upon a down payment of just $4,000 cash and a note for the $372,000 balance.[9]

6. CITC first questioned the purported value of A&K's real estate "inventory" on December 22, 1980, when it petitioned the ALJ (First Petition) to add a financial issue against CBC, therein challenging the current liquid value of tracts 31357 and 34513, and the potential of those tracts to support the (then) $1 million loan from A&K to CBC.[10] CBC opposed the issue by asserting that it had "standing offers" to sell the tracts for $2,232,000 *cash* at the close of a 45 day escrow.[11] But, CBC's opposition, filed February 17, 1981, did not mention two startling details. First: "In June 1980 A&K sold the 186 lots in a bulk sale to Mr. [Eugene] Koon for . . . $2,046,000."[12] Second: Larwin Development had twice in 1980 - once in June and again in December - filed notices of default and initiated foreclosure proceedings against A&K for nonpayment on the note securing the two "Lemonwood" tracts.[13] On May 1, 1981, the ALJ responded to CITC's First Petition by adding financial issues against CBC.[14] On June 1, 1981, CBC sought to avoid the issues by again amending its financial proposal to substitute an alleged loan commitment of $1.7 million from the Bank of Beverly Hills in lieu of its prior reliance on the real estate assets of A&K.[15] Based on that amendment, the ALJ, on July 23, 1981, granted summary decision in favor of CBC on the financial

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[9] CITC Sixth Petition at 4. Larwin Developments shortly sued A&K in state court to foreclose on the two "Lemonwood" tracts in a dispute over A&K's nonpayment of $104,000 (first installment) Larwin claimed had been due since November of 1979. *See infra* para. 6. At the time of the litigation over the Sixth Petition (September 1982), A&K's debt to Larwin was stated to be roughly $470,000, interest on the debt considered. CITC Reply To Opposition To Sixth Petition at 15.

[10] CITC Exceptions at 48. As noted at note 7, *supra*, CBC, in March 1979, increased its reliance on A&K to $2.5 million, again based on A&K's 1978 financial statement.

[11] *Id.*

[12] *Id.*, at 55 (*quoting CBC*). This purported, but unreported, 1980 sale of the A&K land to Koon was belatedly revealed in an affidavit of Harry L. Keiffer attached to CBC's July 29, 1981 opposition to CITC's Third Petition To Enlarge Issues Against CBC. In that opposition, CBC also alleged that Koon had agreed to "assume" the remaining A&K debt to Larwin Developments (and to further "pay A&K 50 percent of the profits on the property when resold."). CBC Opposition To Third Petition at 3. Koon's alleged June 1980 "assumption" of the Larwin debt, as will be seen briefly, (*infra.* para. 8 & note 28), becomes problematic.

[13] *See* CITC Sixth Petition at 30-35.

[14] *Memorandum Opinion and Order*, FCC 81M-1376 (ALJ 1981).

[15] CITC Sixth Petition at 37-38; 195-212. However, the $1.7 million Bank of Beverly Hills loan letter indicated that CBC had promised collateral in the form of a "trust deed" to the two (already "sold") "Lemonwood" tracts. Letter of May 21, 1981 from [allegedly] Richard M. Gill, Senior Vice President, Bank of Beverly Hills to Harry L. Keiffer. [*reprinted in* CITC Sixth Petition at 209]. Gill later denied signing that May 1981 letter. *See infra* para. 8 & note 28. Keiffer conceded that he did not deal primarily with Gill, but — coincidently — with J. Albert White, erstwhile president of the Bank of Indio (*see*

issues he had added.[16]

7. On July 10, 1981, though, CITC had filed yet a Third Petition which alleged that CBC had, all along, misrepresented the "Lemonwood" real estate as "tracts" and "ready to build lots," asserting that these are terms-of-art under state law connoting requisitely developed real estate parcels.[17] CITC's allegations were based on its contention that, under California law, individual "lots" cannot be sold until the relevant local authority reviews a developer's plans and approves a "final tract map."[18] However, it appears that A&K not only had no "final tract maps," it had even allowed to expire the "tentative tract maps" it had acquired from Larwin Development at the time it succeeded to the land in August 1978.[19] It was then, in its July 29, 1981 opposition to CITC's Third Petition, that CBC first contended that the land had, in fact, been "sold" in June 1980 to one Eugene Koon for $2,046,000[20] and also conceded the Larwin foreclosure proceedings.[21] CBC's opposition appended the affidavit of Harry L. Keiffer in which he confessed "error" in promising a "trust deed" (on land allegedly sold to Koon in 1980) as collateral for the $1.7 million Bank of Beverly Hills loan.[22] Kieffer averred that he had corrected the collateral to reflect a "contract receivable" from Koon for $2,232,000, and had personally waited for Richard M. Gill, Senior Vice President of the bank to sign a letter reaffirming the loan commitment.[23] Based on this alleged 1980 "sale" to Koon and the revised Bank of Beverly Hills letter, the ALJ

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supra note 7), and, at times here pertinent, Cashier of the Bank of Beverly Hills. CITC Sixth Petition at 42-43.

[16] *Order*, FCC 81M-2263 (ALJ 1981).

[17] *See* CITC Exceptions at 54-55.

[18] CITC Sixth Petition at 6.

[19] *Id.*

[20] CITC Exceptions at 55. *See also supra* para. 6 and note 12. But, CBC later retracted its July 1981 assertion that the land was "sold" in June 1980 to Eugene Koon for $2,046,000; one year later, CBC asserted that the "alleged 'sale' " (the "allegation", as a matter of fact, being CBC's) was not a "sale" after all, but merely an "executory" agreement for Koon to purchase that land at some *future, unspecified* date. CBC Opposition To Sixth Petition (filed August 16, 1982) at 10. Thus, whereas CBC had, in July 1981, interposed the "alleged" June 1980 "sale" to Koon to prove the land's $2 million worth *at (and prior to) that time*, it now argued that the actual "sale" was not to take place until some indefinite prospective date. *Id.* Neither CBC nor the Koon "agreement" intimate whether the "Lemonwood" tracts would have to be partially developed, fully developed, without houses, with houses, (or, for that matter, with or without oil leases) for the "sale" to eventually occur. *See id.*, at 9-10.

[21] CITC Exceptions at 55.

[22] *Id.*, at 56.

[23] *Id*, at 56-57. Although Gill admits to signing the revised loan letter, he has now sworn that he did so based only upon "misrepresentations" made by Keiffer as to the status of the "Lemonwood" land. *See infra* para 8 and note 30.

denied CITC's Third Petition.[24]

8. On July 1, 1982, CITC ultimately filed its Sixth Petition To Enlarge Issues, a 395-page blockbuster, the fragments of which to date remain embedded in CBC's basic qualifications. While repeating much of its previous petitions, CITC therein alleged: (1) that, at the time J. Albert White supposedly committed the Bank of Indio to a $1.5 million loan to CBC, (a) the bank was merely three months old and had net assets of only $1.3 million[25] and (b) in any event, under California law, no loan to a single entity could exceed 20% of its assets[26]; (2) that the alleged "sale" of A&K's "tracts" to Koon was illusory because (a) it squarely violated A&K's contract with Larwin Developments[27] and (b) *not once* in defense of Larwin's 1980 foreclosure action against A&K on the tracts did A&K interplead Koon, who had allegedly "assumed" A&K's debt to Larwin in June 1980[28]; (3) that the purported loan commitment from the Bank of Beverly Hills was a sham in that (a) the authorizing signature on the May 28, 1981 bank letter was falsified[29] and (b) that the bank had repudiated

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[24] *Memorandum Opinion and Order*, FCC 81M-3186, released October 8, 1981.

[25] CITC Sixth Petition at 13-14 (and supporting documentation referenced therein).

[26] *Id.*, at 14. This basic contention had been made in CITC's Fifth Petition.

[27] *Id.*, at 24. The A&K/Larwin agreement provides:

> 10. *Assignment.* Neither the agreement nor any right hereunder may be assigned by Buyer without Seller's prior consent, provided, however, Seller shall not unreasonably withhold said consent.

[28] In an affidavit accompanying CITC's Sixth Petition, Larwin's attorney deposed:

> I am fully acquainted with the Larwin file, the L.A. County Superior Court File No. NOC 3525 and the Appeals Court File No. 63371 all relating to this matter. Nowhere in any of these files does the name of Gene Koon appear.
>
> As one of the attorneys for Larwin, I have ascertained that Larwin has received no information from either Mr. Koon or A&K that Mr. Koon assumed the Larwin obligation relating to former tentative tract no. 34513 and 31357.

Affidavit of Robert A. Levinson, Esq. at 2 [Sixth Petition at 169]. Levinson further asserted complete familiarity with the foreclosure proceedings and, after reading Keiffer's affidavit asserting that "Mr. Koon assumed [in June 1980] the Larwin obligation related to those tracts . . . ," stated (*id.*):

> Larwin has never received a copy of an assumption agreement, and has just now become aware of an alleged agreement between A&K and Koon, if it even exists. Neither Keiffer, nor A&K, nor California Broadcasting Corporation have informed Larwin of the agreement with Koon.

[29] CITC Sixth Petition at 42-45. The bank Vice President's attached affidavit averred:

> The Bank's dealings with Mr. Keiffer were through the auspices of Mr. White. With respect to the May 28, 1981, letter, I prepared a rough draft based upon my understanding that the loan sought by CBC was to be fully secured by certificates of deposit. I thereafter made several modifications in the letter and gave it to Mr. White for finalization. Thereafter, the May 28, 1981 letter was done in final form and was sent from the Bank without my having seen it or approved its contents. In

its alleged commitment to CBC because of — in the words of the bank's Vice President — "serious misrepresentations on the part of Harry L. Keiffer and/or A&K Development Inc."[30]; (4) that rather than being part of the "inventory of ready to build lots" (*see supra* note 8) "worth in excess of $2 million as claimed by CBC (via A&K) in January 1979, the "Lemonwood" property purchase in August 1978 from Larwin for $376,000 was worth according to "the sworn statements of two highly qualified professional California real estate appraisers... 370,000 or less" on November 30, 1978.[31]

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fact, the signature which appears on the bottom of the May 28, 1981 letter was not placed there by me, but rather, was signed by someone else.

Affidavit of Richard M. Gill at 1 [Sixth Petition at 214]. J. Albert White likewise denied "knowledge of who prepared and signed the May 28 letter." Affidavit of J. Albert White at 3 [CBC Opposition To Sixth Petition at 106].

[30] *Id.*, at 215. The serious misrepresentations perceived by Gill were:

> tract number 34513, alleged to contain 67 lots and tract number 31357, alleged to contain 119 lots were actually non-existent at the time the Bank letter was sought. The affidavits I have read indicate that tract number 34513 and tract number 31357 were actually non-existent and that the tentative tracts bearing those identical numbers were allowed to expire in 1978.

Id. And:

> Mr. Keiffer states that in June of 1980, A&K entered into an agreement with Gene Koon "by which he agreed to purchase TR 34513 and 31357 in the Lemonwood Tract for $2,046,000.00 ..." The declaration further states "by the terms of the contract, Mr. Koon assumed the Larwin obligation related to these tracts." I was not aware that the very real property which had been represented to the Bank as being collateral was the subject of a foreclosure action and the matter of litigation with Larwin - Southern California, Inc.

Id., at 216-217. The bank's repudiation of the loan and much of Gill's affidavit were affirmed by the bank's President. Affidavit of H. Anthony Garthshure [Sixth Petition at 218 *et seq.*]. While Gill later softened his recollections, he did not recant his previous statements in any pertinent part. CBC Opposition To Sixth Petition at 43-46 (second Gill affidavit).

[31] CITC Exceptions at 41 (citing to appraisals of Michael O'Conner and Klaas Bos furnished in connection with the Sixth Petition litigation). The Bos appraisal was claimed to be based "on consideration of over 40 land sales in the area, on his personal inspection of the property, and on a careful consideration of the relevant factors as shown in his appraisal report." CITC Reply To Opposition To Sixth Petition at 7. CBC's Opposition To Sixth Petition contained the affidavits of Walter Troth, a local real estate broker, and Eugene Koon, both claiming that the $2 million figure would not have been out of line for the "186 lots." *Id.*, at 6-9. However, CITC reiterates the contention that, in November 1978, the land had not been legally subdivided into saleable "lots", an endeavor which would have required the expenditure of a great deal of development money. CITC Reply To Opposition To Sixth Petition at 8 & n.13 (claiming $2 million needed to transform the land into saleable "lots").

As to CITC appraiser O'Conner's estimate that — even allowing for an increase in value

9. We recognize, as did CITC and the Broadcast Bureau at the time the Sixth Petition was being litigated in 1982,[32] that "timeliness" and "orderliness" are important elements in our adjudicatory process and, in and of themselves, have substantive public interest capital. *See Valley Telecasting Co. Inc.* v. *FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964). If the timeliness of CITC's piecemeal allegations was a concern at the 1982 hearing stage, it is surely no less a concern in considering CITC's 1984 exceptions to the *I.D.* Still, even if the exceptions (and underlying allegations in the CITC petitions) had not unidimensionally raised very serious *prima facie* questions not adequately answered by CBC, we would be painfully uncomfortable in disqualifying CITC after a microscopic examination of *its* finances at evidentiary hearing while glossing over the mighty suspicious circumstances surrounding CBC's own financial proposal(s).[33] Just from the standpoint of the *appearance* of even-handed treatment of the two opposing applicants, we believe that the far wiser course would have been to have heeded the (re)considered advice of the Broadcast Bureau and held hearings on the pyramiding allegations contained in the Sixth Petition. By the time of its filing, it was evident that CBC's multifarious explanations needed first-hand testing in the laboratory of truth. Now, in the face of CITC's forceful exceptions, we cannot conclude on the basis of untried facts that, for example, the value of Keiffer's "Lemonwood" land rocketed from $376,000 to over $2 million in just three months[34] or that the bank letters submitted in support of CBC were *bona fide* loan commitments secured in good conscience by that applicant. Or why certain debts and legal proceedings pertaining to the

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— the land was still worth only $990,000 as of August 1981, CBC's Keiffer reflected:

> Mr. O'Connor's appraisal reflects his opinion of the property's fair market value as of August 7, 1981, in a period of rising interest rates and a depressed housing market. Mr. O'Connor's appraisal as of August 1981 has little relationship to the property's value during the earlier period in question.

Affidavit of Harry L. Keiffer at 4 [CBC Opposition To Sixth Petition at 52] But, despite Keiffer's view that the real estate market was "depressed" in August 1981 compared to its earlier levels, Keiffer had represented to the Bank of Beverly Hills (in July 1981) that the land was actually worth *more* at that time than the $2,046,000 he had claimed the land was worth in his earlier representations to the FCC. CITC Reply To Opposition To Sixth Petition at 12-13.

[32] *See*, respectively, CITC Sixth Petition at 90-93; Broadcast Bureau Comments On Sixth Petition at 2 n.1.

[33] We hasten to record that we have neither ruled upon nor judged the *I.D.'s* disqualification of CITC, nor its exceptions thereto.

[34] We are also not incurious as to why Keiffer, who purchased the land in August 1978 with only $4,000 in cash, would not have flatly accepted over $2 million *in cash* just two years later, a return on his cash investment *500 times over*. Even T. Boone Pickens might blush.

A&K tracts, nor their purported "sale", were not timely reported to the FCC.

10. To assure a thoroughgoing examination of these most curious circumstances surrounding CBC's financial proposal(s), we believe that four of the issues requested in CITC's Sixth Petition[35] will serve as well as any to assure an adequate record on the various allegations contained in that Sixth Petition. If the responses contained in CBC's opposition(s) to these charges prove out, that applicant (and the Board) can proceed further with the satisfying assurance that no indelible blot can sully the beleaguered CBC escutcheon.

11. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the presiding Administrative Law Judge for further action not inconsistent with this *Memorandum Opinion and Order.*

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[35] *See id,* at 94-95. These issues (renumbered) are:

(1) To determine whether CBC has made misrepresentations to the Commission in connection with its financial qualifications.

(2) To determine whether CBC has demonstrated a lack of candor in its statements made to the Commission in connection with its financial qualifications.

(3) To determine whether CBC has violated Commission Rules 73.3514 or 1.65 by failing to accurately report material information concerning its financial qualifications.

(4) To determine, in light of the information adduced under the foregoing misrepresentation, lack of candor and Rule 73.3514 and 1.65 issues, the effect thereof on CBC's basic and/or comparative qualifications.

FCC 84D-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
California Broadcasting Corporation Ventura, California	BC Docket No. 80-698 File No. BPCT-790130LP
Channel Islands Television Corporation Ventura, California	BC Docket No. 80-699 File No. BPCT-790130LQ
For a Construction Permit	

Appearances

Gardner F. Gillespie, III, Susan Wing, John E. Hoover and *Paul Glist* on behalf of California Broadcasting Corporation; *Robert B. Jacobi, Raymond G. Bender, Jr.* and *John Byrnes* on behalf of Channel Islands Television Corporation and *Arthur I. Steinberg* and *Edythe Wise* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: March 22, 1984; Released: March 29, 1984

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of California Broadcasting Corporation (California Broadcasting) and Channel Islands Television Corporation (Channel Islands) who each seek mutually-exclusive authorization for a new UHF station to operate on Channel 16 at Ventura, California.[1] By *Hearing Designation Order* (*DO*), 45 Fed. Reg. 76792, published November 20, 1980, the applications of California Broadcasting and Channel Islands were designated for hearing and the issues as specified in the *DO*, as enlarged and modified, were the

[1] A pleading has been filed by the Los Angeles County Sheriff's Department on November 23, 1983 requesting that any grant on Channel 16 be made conditional on the substitution of another channel without hearing. This pleading has been dismissed as being beyond the jurisdiction of the Presiding Judge.

subject of a "Phase I" evidentiary proceeding which was completed in September, 1981. At the conclusion of the Phase I proceeding, California Broadcasting sought further enlargement of the issues in its Fourth and Fifth Petitions to Enlarge Issues and the requested issues were enlarged and the record closed on the Phase II part of this proceeding on March 11, 1983.

2. The Phase II issues will first be considered in this Initial Decision since the facts on the comparative and financial issues in the Phase I hearing have now been substantially modified in the Phase II proceeding. For example, Channel Islands had originally proposed to locate its antenna on Santa Cruz Island, which island was declared a National Park by Congressional Action on March 5, 1979. The Commission by *Memorandum Opinion and Order* released July 21, 1982 (FCC 82-329) permitted Channel Islands to amend its proposed antenna site to the same site as proposed by California Broadcasting and the areas and populations of each applicant are now almost identical. Thus, comparative evaluation of the areas and population is now moot. Also it appears that Mr. Ralph Andrews', a principal of Channel Islands, claim of local residence may now no longer exist based upon facts developed in the Phase II hearing. Another of the issues considered in Phase I, which has now been modified by the Phase II proceeding is the financial issue against Channel Islands since at prehearing conferences on Phase II, the Presiding Judge ruled that the hearing record on the financial issue should be re-examined under the Review Board's decision in *Bison City Television*, 91 FCC 2d 26, (1982).

3. The issues in the Phase II proceeding are as follows:[2]

> To determine whether Ralph Andrews has displayed such irresponsibility in the management of his business and personal finances that the applicant cannot be relied upon to fulfill the responsibilities of a Commission licensee;
>
> To determine whether a finding by the Bankruptcy Court that Ralph Andrews acted in "bad faith" in connection with the filing of bankruptcy and state court proceedings reflects adversely on Mr. Andrews' character;
>
> To determine whether Ralph Andrews misrepresented facts concerning his liabilities in his Statement of Net Assets and in testimony elicited during his deposition on July 15, 1981;
>
> To determine whether Channel Islands has failed to keep the Commission apprised of all "substantial and significant changes" in Ralph Andrews' financial status as required by Section 1.65 of the Commission's Rules;
>
> To determine whether Channel Islands failed to produce documents concerning Ralph Andrews' financial condition in violation of an Order of the Presiding Judge;
>
> To determine whether Channel Islands has failed to disclose additional judgments and tax liens against its controlling principal, Ralph Andrews; and

[2] These issues were added by FCC 82M-1114 released April 8, 1982 and FCC 82M-1300 released April 23, 1982.

To determine the effect of the evidence adduced pursuant to the foregoing issues on Channel Islands' basic and/or comparative qualifications to be a Commission licensee.[3]

4. Prehearing conferences on Phase II were held on May 11, 1982 and October 15, 1982. The hearing commenced on January 18, 1983 and the record was closed on March 11, 1983. Both California Broadcasting and Channel Islands have filed Proposed Findings of Fact and Conclusions of Law and Reply Findings and Conclusions.

Findings of Fact (Phase II)

5. Before proceeding to consideration of the Phase II issues, a description of the two applicants is appropriate based on facts as developed in Phase I. California Broadcasting is a corporation organized during late 1978 (California Broadcasting Exhibit 1 at p. 5). Harry L. Keiffer is the sole owner of California Broadcasting. Mr. Keiffer is also the President and Director of California Broadcasting (California Broadcasting Exhibit 1 at p. 1). Other than members of Mr. Keiffer's immediate family (his wife, Delores and his son, Stephen), there are no other officers or directors of California Broadcasting (Tr. 687).

6. Channel Islands is a California corporation which, at the time of the Phase I hearing, had 18 shareholders (Channel Islands Exhibit 1). Ralph H. Andrews[4] is Chairman of the Board, Chief Executive Officer, Director and 50.1% owner (Channel Islands Exhibit 20). Mr. Herrick Andrews, the son of Ralph Andrews, will be the Secretary, Director and 3% owner of Channel Islands.[5]

Character Issues[6]

Financial Irresponsibility

7. The Financial Irresponsibility Issue as designated against Channel Islands is as follows:

To determine whether Ralph Andrews has displayed such irresponsibility in the management of his business and personal finances that the applicant cannot be relied upon to fulfill the responsibilities of a Commission licensee.

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[3] In the summer of 1982, Channel Islands amended its application to specify a new antenna site. At the October 15 prehearing conference, the Presiding Judge added a "shadowing" issue against Channel Islands. Tr. 1386-87. In January, 1983, the Presiding Judge resolved the issue in Channel Islands' favor by summary decision. See FCC 83M-222 released January 18, 1983.

[4] All references herein to Andrews, Ralph Andrews and Ralph H. Andrews refer to the father. When reference is made to the son, his full name, Herrick Andrews, will be used.

[5] This brief identification of the Channel Islands corporate structure is adequate for consideration of Phase II issues. A more detailed statement of the corporate structure is contained *infra*.

[6] On all Phase II issues, California Broadcasting has the burden of proceeding and Channel Islands has the burden of proof.

California Broadcasting called Ralph Andrews as a hostile witness concerning his personal financial history. Andrews testified that his personal financial situation began to "turn down" in 1976 or 1977 (Tr. 1767). Andrews had been in a successful TV program production business, Ralph Andrews Productions, Inc. (RAP)[7], prior to those years (Tr. 2496-2506). However, the hearing record will consider various unpaid debts of Mr. Andrews, a requirement that creditors sue to recover, subordination of debts to others, the bankruptcy process and Mr. Andrews' efforts throughout this period to make profitable investments.

1974-1976

8. During the years 1974-1976, Mr. Andrews had unquestioned financial health. Yet, the record concerns a pattern of Andrews' refusal to pay debts. In January, 1974, the Bank of California obtained a judgment against Andrews in the amount of $11,258.00 (California Broadcasting Exhibit A-39). Andrews could not recall if he had paid this judgment (Tr. 1769). West Credit Corporation obtained a judgment against Andrews in March, 1974 for $26,031.85 (California Broadcasting Exhibit 16). Andrews has not paid this judgment (Channel Islands Exhibit 24; California Broadcasting Exhibits 16 and 11; Tr. 1027, 1030-31). In July, 1974, Gerald Schwartz obtained a judgment against Andrews for $2,269.59 (Tr. 1769).

9. For the years 1974 and 1975, the Internal Revenue Service assessed Andrews for at least $9,758.41 in unpaid federal income taxes. As of April 8, 1981, the amount due had not been paid (California Broadcasting Exhibit A-40). On November 20, 1974, the Tax Collector of San Bernardino County recorded an abstract of tax lien against Andrews in the amount of $107.37 (California Broadcasting Exhibit A-73, p. 1).

1976-1978

10. On April 25, 1977, E & K Construction filed a complaint against Andrews for the amount of $8,385.60 (Tr. 1772). This suit arose out of Andrews' failure to pay for services performed on Andrews' residence.[8] There was a stipulation for entry of judgment by the parties in June, 1981, but Andrews could not recall at the Phase II hearing if it had been paid (Tr. 1772-73).

11. Gorian & Associates (Gorian) filed a complaint against Andrews in October, 1978 for his failure to pay for services rendered (California Broadcasting Exhibit 12, p. 5). There was a stipulation for Entry of Judgment and Andrews promised to pay $3,983 in specified installments (*Id.*). Andrews failed to meet the terms of the stipulation and still owed

[7] RAP is wholly-owned by Andrews during this period of time. Some changes in ownership will be considered *infra*. However, Andrews at all times has control of RAP.

[8] Official notice taken of these facts as reported by amendment to the Channel Islands application on June 22, 1981.

Gorian $1,400 as of the date of the hearing (Tr. 1786). Andrews stated he "had other priorities" at the time (Tr. 1787).

12. Andrews continued his failure to pay taxes when due. For the tax year 1978, the Internal Revenue Service assessed Andrews at least $4,291.99 in unpaid federal income taxes. This amount had not been paid as of April 8, 1981 (California Broadcasting Exhibit A-40). As of March 1, 1978, Andrews owed Ventura County personal property taxes in the amount of $1,705.72. That amount has not been paid (Tr. 1774-75).

13. In 1976, Andrews testified that his production company (RAP) began to face financial problems and at the same time, Andrews began to devote both time and money to some personal investments. In April, 1976, at the time that Andrews had other debts outstanding, he and Herman Rush purchased a tract of oceanfront property in Oxnard Shores, California for approximately $400,000 (Tr. 1471). By a Tenancy in Common agreement, Andrews became obligated to pay one-half of all expenses associated with this property and to be responsible for obtaining approval from the California Coastal Commission for their development plans.[9] (Tr. 2516). For these services, Andrews was to receive a 10% override on profits from the eventual sale of the property (California Broadcasting Exhibit A-29, p. 4). Andrews testified that his efforts to obtain Coastal Commission approval for the development plans on the Oxnard Shores property consumed much of his time and he believed that had he devoted this time to this production company and his own personal problems, things would have been different (Tr. 2518).

14. During 1978, Andrews noted his prolonged absence from his production company was due to continued time required on the Oxnard Shores property and a lawsuit he and RAP brought against the Meredith Corporation. Andrews' action against Meredith was successful and he personally would receive about 70% of the judgment (California Broadcasting Exhibit 8, p. 5).

15. RAP filed for Chapter XI bankruptcy on January 3, 1979, just weeks before the Channel Islands application was filed. RAP also filed a notice of automatic stay of all debts and obligations (California Broadcasting Exhibit 17, pp. 1-2). RAP submitted an "arrangement" on May 1, 1980 and a "modified arrangement" in December, 1980. The Bankruptcy Court confirmed the modified arrangement in January, 1981 (California Broadcasting Exhibits 17-19). The Chapter XI filing of Andrews' production company (RAP) permitted Andrews to continue operation of RAP while putting off creditors indefinitely. As of the date of the Phase II hearing, creditors had been paid less than 50% of the amounts due them (Tr. 1605,

[9] Such plans primarily involved obtaining approval to subdivide the property into 14 lots instead of 10 lots.

3109).[10] It was Andrews' testimony that he liquidated asset after asset of a personal nature and put himself in "terrible personal jeopardy" in order to avoid filing for bankruptcy under Chapter XI (Tr. 2504).

16. Andrews could not give particulars of what he did to keep RAP out of Chapter XI. He said he cut the RAP staff, sold some corporate assets, sold some paintings and borrowed money using art objects as collateral.[11] However, some of this money was used to pay his personal expenses (Tr. 1542).

17. In the year prior to the RAP petition for reorganization, the record shows that, according to RAP's statement of affairs, RAP made payments in the amount of a total of $97,677.03 for various personal expenses of Andrews (California Broadcasting Exhibit A-36, p. 14). Also, RAP executed a $140,000 promissory note in February, 1979 in connection with Andrews' purchase of a private residence in Costa Rica (California Broadcasting Exhibit A-36, p. 4). RAP made payments on the note for Andrews and in 1978, paid $4,000 (California Broadcasting Exhibit A-36, p. 9). Andrews testified that he did use RAP to pay his personal expenses "frequently" and that he "may have taken advantage of the corporation . . . " (Tr. 1658).

18. Sidney Silverman, Andrews' accountant, testified that in the years preceding the RAP Chapter XI, Andrews had frequently loaned money to RAP, withdrawn money from RAP and caused RAP to pay Andrews' personal expenses. While Andrews testified as to enormous personal loans made to RAP to avoid Chapter XI, Silverman testified that only $7,600 was owed by RAP to Andrews for loans and salary (Tr. 3090).

19. At the time RAP filed for Chapter XI protection, it owned a 51-foot Grand Banks sailboat at a cost of $145,000 in 1974 (Tr. 1616). The Bankruptcy Court ordered the boat sold, but in the year prior to filing the Chapter XI proceeding, RAP paid $1,622 in slip rental and $12,000 in loan repayments for this boat (California Broadcasting Exhibit A-36, pp. 9-10; Tr. 1618). Throughout the RAP reorganization process, RAP leased a Rolls Royce automobile for Andrews' use (Tr. 1622) and in 1978, made lease payments totalling $6,125.20 (California Broadcasting Exhibit A-36, p. 9). RAP also, despite financial difficulties, continued to make payments on the other automobiles in 1978 (California Broadcasting Exhibit A-36, pp. 9-10).

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[10] As will be seen *infra*, Andrews filed a personal Chapter XI proceeding and claimed therein that RAP had paid its creditors 100 cents on the dollar. He excused this testimony by a claim that he was under stress at the time (Tr. 1609).

[11] Andrews did testify that he sold a house in Costa Rica to avoid Chapter XI for RAP. However, in documents filed with the Bankruptcy Court, that sale did not occur until January 22, 1979 after RAP's bankruptcy was filed.

1979-1981

20. In the years following the RAP bankruptcy filing, Andrews continued a practice of failing to pay debts when due, for example:

(a) The Gorian stipulation for entry of judgment in the amount of $3,983 was entered in April, 1979 (Tr. 1782-83).

(b) Evalean Saquin obtained a judgment against Andrews for $3,128.25 (plus interest) in August, 1979 (Tr. 1792; California Broadcasting Exhibit A-42).

At the same time he failed to pay these debts, he continued to make large investments and obligated himself to make significant payments on the acquired assets. In January, 1980, he purchased a two-thirds interest in a beach house at Oxnard (California Broadcasting Exhibit A-52). While he made no down payment, he invested over $100,000 in the reconstruction of the house, which had substantial fire damage when purchased (California Broadcasting Exhibit A-58, p. 6). When the house was purchased, Andrews and the other buyers (Herrick Andrews, Bruce Paranay and William Addison ("Kelly") Stage III assumed a $147,000 first mortgage to the bank and a $291,559 second mortgage to Dr. and Mrs. Yaffe, the sellers of the property (California Broadcasting Exhibit A-46, p. 6; and Exhibit A-71, p. 9). Andrews obligated himself to make the payments on the first trust, after he moved into the house (Tr. 1679, 2192)[12] and he agreed with the co-owners that he would be responsible for payments on the Yaffe trust (Tr. 1679, 2197). On the Yaffe note, $145,779 was due by January, 1981, and the balance due January 22, 1982 (Tr. 2196). In February, 1980, Andrews agreed to make all payments due on the Oxnard Shores property he owned jointly with Herman Rush. These payments included interest payments of $25,760 and legal fees for development plans before the California Coastal Commission. In consideration of the increased obligations of Andrews, his "override" from the profits on resale were increased from 10 to 20% (California Broadcasting Exhibit A-109, p. 4; Tr. 1492-97).

21. On March 12, 1980, Andrews entered into a contract with Moses Hurwitz entitled the Agreement of Limited Partnership of Oxnard Shores Development Company. That agreement gave Hurwitz a 7.5% interest in the Oxnard Shores property in return for $75,000. At the same time, Hurwitz also loaned Andrews an additional $75,000 secured by a deed of trust on the property. The agreement was amended May 27, 1980 to increase Hurwitz's interest to 10% for an additional $100,000 (Tr. 1517). When Andrews informed Hurwitz that he was unable to buy back Hurwitz's interest, the parties amended the agreement on May 20, 1981 to fix the amount due under the agreement as $282,226 plus interest (California Broadcasting Exhibit A-82, p. 2). Andrews executed a second

[12] At the Phase I hearing, he said that he moved into the beach house in 1980 (Tr. 921-22).

deed of trust secured by the Oxnard Shores property (California Broadcasting Exhibit A-81).

22. On January 22, 1981, Andrews failed to make the payment of $145,779 to the Yaffes (the sellers of the beach house) (Tr. 1679-80). The same day as the Yaffe default, Andrews entered into an agreement with Thomas Voiss to purchase a 3% interest in a gold mine (Minera d'Oro) in Costa Rica in exchange for a 20% interest in the Oxnard Shores property and a 20% interest in the *Meredith* judgment (Tr. 1698-99). Within six months thereafter, Andrews obtained another 1% interest in the gold mine in exchange for a historic document worth $100,000 (Tr. 1530, 1548-49).

23. At about the time Andrews failed to make the first Yaffe payment in late January, 1981, Andrews purchased a pair of antique Tiffany lamps from Mansour Rofeh for $120,000. He executed a promissory note in this amount on February 1, 1981 which note was secured by a deed of trust on the beach house. Andrews described the opportunity to purchase the lamps as one he could not "pass up" (Tr. 1691, 1693, 1698; California Broadcasting Exhibit A-37). In June, 1981, Andrews cancelled the Rofeh deed of trust on the beach house by executing a substitute deed of trust on the Oxnard Shores property (California Broadcasting Exhibit A-38; Tr. 1696). While Andrews testified that the substitute deed of trust involved no new consideration (Tr. 1535) he later described plans to secure the Rofeh obligation with the *Meredith* judgment and he conceded that he had offered to secure the Rofeh debt in this manner (Tr. 2245-46).

24. During the spring and summer of 1981, Andrews failed to meet a number of obligations. He had defaulted on the Oxnard Shores property, his condominium and the beach house (Tr. 2835). He also had failed to pay county property taxes on his Oxnard Shores property in the amount of $24,576.48 (California Broadcasting Exhibit A-73, p. 5).

The Andrews Personal Chapter XI

25. Andrews filed personal bankruptcy under Chapter XI on October 14, 1981. At the time, Andrews described his financial situation as "a general overall tumbling of my rather fragile [financial] house ***" (Tr. 1584). The beach house faced imminent foreclosure, he was in default on his condominium, and he was in default on the Hurwitz and Rofeh trust deeds on the Oxnard Shores property (Tr. 1584). The Chapter XI was filed "to buy me some time and to give me a breather" (Tr. 1585). The filing of the Chapter XI resulted in a general stay of the requirement that he pay his rightful creditors (Tr. 1738).

26. The foreclosure sale of Andrews' beach house was scheduled for October 14 or 15, 1982, but, Chapter XI put this off "in the nick of time" (Tr. 1973). Although Andrews had received the first installment of the *Meredith* settlement in August, 1981, he gave $100,000 to Voiss and

invested over $250,000 in Channel Islands rather than pay the Yaffes to avoid foreclosure (Tr. 1834).

27. Andrews blamed his personal bankruptcy on money he had loaned to RAP to keep that company operating and that some $330,000 in actual cash was involved. Such worksheets as were produced indicated Andrews' loans to RAP were less than $235,000 (California Broadcasting Exhibit A-100, p. 2). Before entering Chapter XI reorganization, Andrews made no effort to sell his interest in Minera d'Oro (valued at $1,397,746) (Tr. 1698-99) and he refused to accept a $4 million offer with $1.4 million in cash for the Oxnard Shores property[13] (Tr. 1699-1700). Andrews made no other efforts to avoid filing for reorganization. He did attempt to get a loan from William Simon and Thomas Voiss to pay the Yaffes, but the bank was not willing to accept the collateral offered (Tr. 1706-25).

28. Andrews was late in filing his statement of affairs with the Bankruptcy Court (Tr. 1676) and as of the date of Andrews' testimony, January 19, 1983, he still had filed no plan with the court to pay off his creditors (Tr. 3101). Until a plan is filed, Mr. Andrews' obligations to his creditors are stayed.

29. Andrews' November, 1982 Statement of Assets and Liabilities (California Broadcasting Exhibit A-93, p. 10) shows that he was under a contract with Columbia Pictures Television and had an annual income, from salary, fees and royalties of $446,000. However, on March 28, 1983, Andrews obtained an *ex parte* emergency order from the Bankruptcy Court in order to secure a loan made by William Simon to Andrews in the amount of $84,264.11. The security for the loan was the *Meredith* settlement and the money was used to pay a debt in that amount to Channel Islands (Official notice taken of the pleading filed with Judge Calvin K. Ashland on March 28, 1983 and the Order issued by Judge Ashland in United States Bankruptcy Court, Central District of California (Case No. 81-13106-CA).

Bad Faith

30. By *Memorandum Opinion and Order* released April 8, 1982, the following issue was added against Channel Islands:

> To determine whether a finding by the Bankruptcy Court that Ralph Andrews acted in "bad faith" in connection with the filing of bankruptcy and state court proceedings reflects adversely on Mr. Andrews' character.

On January 5, 1982, Judge Ashland issued an opinion which lifted the automatic stay with respect to payments on the beach house which had resulted from Andrews filing for Chapter XI protection. This stay had prevented the Yaffes from foreclosing on the beach house. Judge Ashland

[13] The testimony is in conflict here. Andrews first said he did not take the offer (Tr. 1700). Later, he said he wanted to accept it but the offer was withdrawn (Tr. 1700-01).

found that Andrews had acted in "bad faith" before the court, and the stay was vacated pursuant to 11 USC 362(d)(1). The court made the following findings:

(a) William Addison Stage III, who owned 8⅓% interest in the beach house filed a Chapter XIII "straw man" petition on June 15, 1981. Judge Ashland dismissed this petition because Stage did not meet the jurisdictional requirements for a Chapter XIII filing;

(b) On June 18, 1981, the co-owner of the beach house filed suit against the Yaffes in Ventura County Superior Court for declaratory relief and to set aside the default under the Court's Opinion (California Broadcasting Exhibit A-52);

(c) On June 24, 1981, the co-owners attempted to obtain a temporary restraining order in state court to halt the pending foreclosure. The request was denied;

(d) Stage filed yet another "straw man" bankruptcy proceeding on July 1, 1981 under Chapter XI. In September, 1981, Judge Ashland relieved the Yaffes of the automatic stay because Stage's filing was found to have been in bad faith;

(e) The co-owners attempted to obtain a preliminary injunction in state court on July 9, 1981 to halt the pending foreclosure which the Ventura County Superior Court denied on that date; and

(f) Judge Ashland concluded that in view of the two prior "straw man" bankruptcy filings and the filing of the state court action, Andrews' actions had been in "bad faith".

31. The importance of Judge Ashland's "bad faith" finding is now considered in the context of this case. As previously shown, Andrews was obligated to make all payments to the Yaffes on behalf of the co-owners (Tr. 1975) and Andrews recognized that if he filed for Chapter XI himself, the matter would have to be reported to the FCC (Tr. 1975). But, if Stage filed,[14] Andrews believed the Chapter XI proceeding would not have to be reported (Tr. 1975) and Andrews believed that this procedure, i.e., Stage's Chapter XI filing, would result in an advantage to Andrews in the FCC proceedings, since the adverse changes in his financial position would not become a matter of public record (Tr. 1976-77). Andrews admits that he was "desperately trying to buy time" to iron out his problems (Tr. 1977). In fact, Robert Greenfield, Esq., Andrews' bankruptcy counsel, acknowledged to the Bankruptcy Court in January, 1982 that the reason Andrews had not initially filed for bankruptcy himself was that it would adversely affect his stature in a hearing before the FCC (California Broadcasting Exhibit A-58, p. 4). Robert Greenfield's statement before the Bankruptcy Court alleged that Andrews had taken this position based on the advice of previous bankruptcy counsel, who was John Read, Esq. It turns out that Mr. Read had represented Stage in his first bankruptcy filing and that Andrews wrote a check to Read in the amount of $750. Andrews denied

[14] Mr. Stage was the only co-owner of the beach house who was not also an owner or stock subscriber of Channel Islands.

that the $750 check was for preparing Stage's first bankruptcy, but Andrews cannot explain the check other than he may have made a loan to Stage in connection with his bankruptcy (California Broadcasting Exhibit A-59; Tr. 1990).

32. Returning now to Judge Ashland's Chapter XI proceeding and after the automatic stay was removed, but before the foreclosure sale had actually occurred, items considered a part of the realty were taken by certain co-owners of the beach house (Tr. 1990-93, 2000) which resulted in a hearing related to "waste" committed on the house. Judge Ashland stated on March 30, 1982:

> Referring to this property and with specific reference to the Yaffes and the things that have happened to date, *I have never seen a case of really more outrageous conduct on the part of people than this case*, all done in the guise of protecting the Debtor or something — *multiple bankruptcies, joint owners filing one at a time — and now really what is alleged to be, appears, if it happened, deliberate destruction of the property* and there are photographs here to show those things that are enumerated in the Complaint. When you think about it, it's incredible. Put it back. [California Broadcasting Exhibit A-61 (emphasis added)].

33. In an affidavit filed in the Bankruptcy Court, Andrews stated "I had nothing whatsoever to do with the alleged removal of anything connected with my house" (Tr. 2856). Andrews stated at the FCC hearing, that it was his son Peter and Bruce Paranay, a Channel Islands principal, that removed items from the house. Andrews testified that he never gave any instructions to his son to remove items from the house and he had nothing whatsoever to do with what happened at the house (Tr. 1995). Andrews also said he had not spoken to his son about what happened at the house (Tr. 1995). However, contrary to Andrews' statement, Herrick Andrews, another son and Secretary of Channel Islands, testified at his deposition that Peter was at the house to remove items "on behalf of my father" (California Broadcasting Exhibit A-60, pp. 44-45). Andrews then reviewed this part of Herrick Andrews' deposition and conceded that previously he had asked Peter to remove some items from the beach house (Tr. 2637). At the waste hearing on November 30, 1981, Judge Ashland stated that "this is as much bad faith as any case I have ever seen only different facts" (Tr. 1927-28). After the court issued its formal opinion on January 5, 1982, Andrews petitioned for reconsideration of the order. Andrews testified before the Judge at a hearing on January 18, 1982. Judge Ashland refused to reconsider his bad faith findings, stating:

> "[T]here is nothing that is contained in them that I can see that is erroneous. They might be erroneous only for what they don't contain, not for what they do contain. *** I don't think I should amend the findings. I think they're accurate." Tr. 1966, 1968.

34. On January 25, 1982, Andrews filed an "*Ex Parte* Emergency Application to Vacate Findings of Fact and Conclusions of Law entered on

January 5, 1982" with the Bankruptcy Court. The pleading urged the court to vacate its January 5, 1982 order as "superfluous" and urged the whole matter was moot since the foreclosure sale had eventually occurred (California Broadcasting Exhibit A-118, pp. 3-4). Judge Ashland issued an *ex parte* order which vacated his previous findings as moot, since the sale of the beach house had already taken place (Channel Islands Exhibit 30, p. 2).

Misrepresentation and Lack of Candor

35. By *Memorandum Opinion and Order* released April 8 and April 23, 1982, the Presiding Officer added the following issues against Channel Islands:

> To determine whether Ralph Andrews misrepresented facts concerning his liabilities in his Statement of Net Assets and in testimony elicited during his deposition on July 15, 1981;
>
> To determine whether Channel Islands has failed to keep the Commission apprised of all "substantial and significant changes" in Ralph Andrews' financial status as required by Section 1.65 of the Commission's Rules;
>
> To determine whether Channel Islands failed to produce documents concerning Ralph Andrews' financial condition in violation of an Order of the Presiding Judge; and
>
> To determine whether Channel Islands has failed to disclose additional judgments and tax liens against its controlling principal, Ralph Andrews.

36. The consideration of these issues must be viewed in the light of a December, 1980 California Broadcasting Petition to Enlarge Issues which sought financial and disclosure issues against Channel Islands. The issues were added and evidence was adduced at the Phase I hearing in September, 1981. The Channel Islands actions must also take into account the testimony in the Phase I hearing.

Financial Misrepresentation

37. In July, 1980, Andrews certified in the Channel Islands application, as originally filed, that his current liquid assets exceeded by $400,000 his current liabilities. No supporting data was provided by Andrews for the $400,000 figure, which, in part, was a basis for enlarging the issues in Phase I (California Broadcasting Exhibit A-32). At the Phase II hearing, Andrews testified he had less than $50,000 in liquid assets (defined as cash, negotiable securities, or anything else that could be sold on short notice).

38. Andrews attempted several explanations of this $400,000 vs. $50,000 discrepancy. First, Andrews said that liquid assets really meant that his "assets exceeded his liabilities" by $400,000 (Tr. 1590). Second, he asserted that there had been a typographical error (Tr. 1590-91). Third, he claimed that whoever prepared the application for Channel Islands had put words in his "mouth" (Tr. 1591). Andrews concluded that he could not

have meant liquid assets in excess of $400,000 over current liabilities since he never had "those kinds of liquid assets" in his life (Tr. 1592). At this point in the hearing, a recess was taken and Andrews said he wanted to modify his previous testimony (Tr. 1593). Andrews now stated that his previous counsel of record had given him a different definition of the term "liquid assets" than that given by California Broadcasting counsel during questions before the recess. However, Andrews' definition of the term — cash — marketable securities or anything he could turn into cash in "a very short period of time" appears no different from the definition provided by California Broadcasting counsel in questions before the recess (Tr. 1594). Andrews also added that at the time he signed the 1980 certification of his liquid assets, he believed he could liquidate his art collection for $400,000 (Tr. 1596-97). Andrews believed that the art collection would bring $400,000 even at a distress sale, but, assuming this to be true, Andrews does not explain how such $400,000 would be in excess of current liabilities, which were considerable at the time.

39. The $400,000 value placed by Andrews on the art collection was subject to modification. In January, 1981, Andrews estimated that the art collection could be sold for $259,000 (California Broadcasting Exhibit 3, p. 3; Tr. 2068). Andrews also was asked why he did not make the first payment on the Yaffe trust in January, 1981 ($147,000) and he stated that the art collection would not have "made that payment ***" (Tr. 1680). Andrews described efforts to sell part of the collection. He was offered $15,000 for some Pre-Columbian objects he valued at $35,000 and he was offered only $30,000 for a painting because the market was "very tough" at that time and that some of his possessions did not have "cash value". Andrews was not willing to sell these items at that time for less than he felt they were worth (Tr. 1690).

40. When California Broadcasting requested the financial issue against Channel Islands, Andrews filed an amendment to the Channel Islands application enclosing Andrews' statement of net assets as of January 31, 1981 (Tr. 1820). The purpose of this Channel Islands amendment was to demonstrate Andrews' commitment to purchase Channel Islands' stock for $250,000 and to guarantee a bank loan. This Andrews statement of net assets was prepared by Andrews' accountant, Sidney Silverman, with input and review by Andrews (Tr. 2008-09).

41. One of Andrews' primary assets listed in the Statement of Net Worth was his Oxnard Shores property, represented to be worth $3,649,400 (California Broadcasting Exhibit 8, p. 3). This value was computed on the basis of $400,000 fair market value, with deductions representing interest due to Tom Voiss as consideration for Andrews' purchase in Minera d'Oro, the Costa Rica gold mine (Tr. 3037-39). The statement did not account for Rush's ownership interest in the property,

except for a footnote which described Rush's interest as an "option to purchase 50% of the property ***" (California Broadcasting Exhibit 8, p. 5).

42. Silverman's testimony and worksheets show that the Statement of Net Assets treated Andrews as the 100% owner of Oxnard Shores. Andrews, however, stated that the $3.6 million figure was based upon a 60% interest in property valued at $5.6 million (Tr. 2010-11). Andrews said the $5.6 million value was based upon an appraisal ordered by William Simon (Tr. 2016). However, it developed that the $5.6 million appraisal was not prepared until several months after the Statement was filed as an amendment, Andrews then stated that he had appraised the property for this amount (Tr. 2017-18). Andrews was then shown Silverman's worksheets which estimated the value at $4 million ("per written offers attached") and subtracted an amount assignable to Minera d'Oro. Andrews said he had never seen the worksheets before, and, that Silverman had not explained the calculations that way (Tr. 2012).

43. At Andrews' 1982 deposition, he recognized that Silverman did base his calculations on a written offer for $4 million and reduced the amount by the amount assignable to Minera d'Oro (California Broadcasting Exhibit A-64, p. 2). Silverman himself testified on the calculation and said he had had many discussions with Andrews concerning his calculation of the Oxnard Shores value shown in the Statement (Tr. 3035-37). It is uncontraverted that if the Statement had treated Rush as having an actual interest in the property, the value of this asset would be reduced to approximately $1.5 million (Tr. 2048-50). Andrews recognized throughout the hearing that Rush has had a 50% equity interest in the property since 1976 (Tr. 1471-72). Andrews testified at the instant FCC proceeding that there had been "no secrets" about Rush's existing 50% ownership interest (Tr. 2044). Yet in RAP's bankruptcy proceeding, Andrews had sworn under penalty of perjury that the Oxnard Shores property was "owned by him personally *** subject to an option to acquire an undivided 50% interest in favor of Herman Rush" (California Broadcasting Exhibit A-66). Andrews failed to explain why none of these documents were provided to California Broadcasting in 1981 in response to a request for production of documents which would show whether non-cash items are solely or jointly owned (California Broadcasting Exhibit A-102 at 15).

44. Andrews' Statement of Net Assets did not show the equity interest in the Oxnard Shores property of Moses Hurwitz. The amended Limited Partnership Agreement with Hurwitz gave Hurwitz an approximate 10% interest in Oxnard Shores. Andrews explained that this agreement is "not what it purports to be" (Tr. 1512). He described the document as a "sham partnership agreement *** (Tr. 2528). He described

the agreements with Hurwitz as loans, no matter what the documents say (Tr. 2530).

45. The liabilities section of the Statement of Net Assets as submitted by Andrews also failed to show a debt of $40,250 owed to British Mortgage Co. (George Howarth) (Tr. 2588; California Broadcasting Exhibit A-79). Andrews first testified at the hearing that this debt was reflected in his Statement (Tr. 2239). However, during Andrews' deposition testimony on this matter, when this was called to his attention, he said the document memorializing the debt was in his desk drawer.[15] He equivocated and the record contains no factual explanation where the Howarth debt appears on the Statement (Tr. 2315, 2238-42).

46. The Statement of Net Assets submitted by Andrews understated Andrews' obligations on the beach house by approximately $145,000 because the Statement failed to reflect that Andrews had assumed full responsibility, after he moved into the house, for making the payments to the first and second trust holders.[16] In an affidavit of Andrews submitted in response to California Broadcasting's Fourth Petition to Enlarge Issues, Andrews listed his liabilities on the beach house as $295,000 which represents his ⅔ ownership. Andrews admitted that he had assumed full responsibility for the two trusts on the house (Tr. 2192, 2197).

47. The Statement of Net Assets failed to note that Andrews accepted full responsibility for all payments on the Oxnard Shores property, including the annual interest of $25,760 due in May, 1981. Andrews, at his deposition in July, 1981, said the interest was not listed because he and Rush alternated in making the interest payments and 1981 was Rush's year to pay (Tr. 2229-31; California Broadcasting Exhibit A-76). When Andrews was asked for a copy of the check for such payment, Andrews produced a check signed by him and explained that Mr. Rush had reimbursed him for this amount (California Broadcasting Exhibit A-78, p. 2). At the Phase II hearing, Andrews conceded that Rush had not made the payment in 1981 (Tr. 2227-28). After Andrews admitted that it was he and not Rush that made the interest payment, Andrews explained that there was no reason to include the May, 1981 on the Statement reflecting liabilities as of January 31, 1981 because he did not realize it was a current liability at that time and that the testimony about Andrews and Rush alternating in making such payments "was done in levity" (Tr. 2230).

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[15] This document was produced at the deposition on the day following this testimony (Tr. 2239).

[16] $147,000 first mortgage to the bank and a $291,559 second mortgage to Dr. and Mrs. Yaffe.

Failures to Report Changes in Financial Condition

48. Andrews received repeated reminders of his reporting obligation under Section 1.65 of the Rules from his counsel as he put it "on an average of once a week" since the filing of the Channel Islands application (Tr. 2622). Andrews received several memos on his 1.65 obligations (Tr. 999-1001, 1803-07, 2633; California Broadcasting Exhibit A-113, A-23, A-24, A-114, p. 3 and A-25). Andrews was also aware that California Broadcasting was seeking a financial issue against Channel Islands in December, 1980 and of the allegations made by California Broadcasting in support of its motion (Tr. 1812, 1817-18, 1821-24).

49. During the time the California Broadcasting petition to enlarge which sought the financial issue against Channel Islands was pending, Andrews' financial situation was changing. On January 22, 1981, Andrews missed the $147,000 payment to the Yaffes on the beach house (Tr. 1819). On February 1, 1981, Andrews executed a trust deed for $20,000 in favor of Mansour Rofeh secured by the beach house (Tr. 1819-20). This trust deed was recorded on February 26, 1981 (California Broadcasting Exhibit A-37). On March 23, 1981, the Yaffes issued a notice of default in connection with Andrews' failure to make the payment on the beach house (Tr. 1831; California Broadcasting Exhibit A-107). The financial and reporting issues requested by California Broadcasting against Channel Islands were added by *Memorandum Opinion and Order* (*MO&O*) on May 10, 1981 (California Broadcasting Exhibit 10). After the *MO&O* was issued adding the financial and reporting issues against Channel Islands, there were further unreported adverse changes in Andrews' financial position.

50. The California Coastal Commission rejected Andrews' request to subdivide the Oxnard Shores property into 14 building lots instead of 10 lots. The difference between Andrews having 10 or 14 lots raised a significant question about the property's value (Tr. 1497-1502). After Andrews had missed his payment due Hurwitz in the spring of 1981, the Limited Partnership Agreement was converted into a note and deed of trust on the property in the amount of $282,000 plus interest. Andrews replaced the Rofeh deed of trust on the beach house with one on Oxnard Shores. He also placed a deed of trust of approximately $220,000 on the property temporarily in favor of his counsel, William Simon (Tr. 1833-34).

51. Andrews, during this same time period, agreed to settle the *Meredith* litigation for more than $1 million less than the value reflected on this Statement of Net Assets and he agreed to take the reduced payment in installments over a 10-year period (Tr. 1741-42). He promised 10% of the stock in RAP to Tom Voiss, he missed payments on his condominium and that property was foreclosed and sold (Tr. 2835). In

addition, Andrews incurred unsecured liabilities. He borrowed $25,000 from Rush, $25,000 from Voiss and $16,000 from his mother (Tr. 2271).

52. Finally, Andrews entered into a handwritten financial settlement with his former wife, Margaret Andrews, which contemplated a transfer of over $1 million worth of assets to her. She was to receive $810,000 from the *Meredith* settlement, $200,000 from the sale of Oxnard Shores, 10% of RAP and one share of Minera d'Oro (California Broadcasting Exhibit A-45).

53. None of these matters were reported to the Commission until after the Phase I hearing was completed and California Broadcasting raised questions about these matters. At the Phase II hearing, Andrews conceded the deeds of trust must be reported (Tr. 2635-36). Andrews explained that he did not report the Rofeh deed of trust because the transaction was a "wash", i.e., a trade of assets for liabilities (Tr. 1691, 2251-53). Andrews further explained that the due date on the Rofeh deed and trust was "meaningless" because Rofeh had agreed to accept payment whenever the Oxnard Shores property was sold (Tr. 1695). The record contains no support for this further agreement with Rofeh and at Andrews' bankruptcy proceeding, it was conceded the payment to Rofeh was past due (Tr. 3118).

54. Andrews was under order of the Presiding Officer (granted June 30, 1981) to produce documents requested by California Broadcasting in the first week of July, 1981 (California Broadcasting Exhibit A-102). California Broadcasting sought all documents relating to any encumbrances on Andrews' assets. Channel Islands did not produce any documents relating to Rofeh's interest in Andrews' assets even through Andrews had executed the deed of trust on the Oxnard Shores property about one week prior on June 25, 1981. At Andrews' deposition on July 15, 1981, he was asked to disclose encumbrances on Oxnard Shores, other than those relating to Hurwitz and the original mortgage. Andrews responded that he knew of none (Tr. 2254).

55. Andrews stated that the deed of trust in favor of William Simon in August, 1981 on the Oxnard Shores property did not have to be reported because Mr. Simon advised that since the amount was repaid in three weeks, no reporting was required (Tr. 2632-33). Also, while the order to produce documents related to all encumbrances on Andrews' assets none of the documents relating to the Simon deed of trust were produced by Channel Islands (California Broadcasting Exhibit A-102, p. 15).

56. None of the documents or facts concerning Andrews' several adverse changes in his financial position were made known by Andrews prior to the date Andrews filed for personal Chapter XI bankruptcy and it was not until 1982 when after Andrews; affairs were public knowledge, due to the Chapter XI proceeding, that the documents were obtained from

counsel for Channel Islands (California Broadcasting Exhibit A-84; Tr. 2291).

57. Andrews has offered no explanation on the record for his affidavit submitted in opposition to California Broadcasting's petition to enlarge issues which claimed no material changes in his financial condition. The affidavit stated, in part, is as follows:

> I have not updated or amended my statement of net assets as I did not believe there have been material changes from my original statement of January 31, 1981, especially after August 19, 1981, when I paid my full subscription to C.I.T.C. * * * [California Broadcasting Exhibit A-71 at 6-7].

58. As previously indicated, Andrews had a handwritten agreement which provided for $1 million in assets to be transferred to Andrews' ex-wife. As a follow-up to the California Broadcasting July, 1981 deposition of Andrews, California Broadcasting requested by letter of August 4, 1981 any documents which reflect potential liability to his former wife (California Broadcasting Exhibit A-77). Andrews received this request on August 4 and Channel Islands' counsel responded to California Broadcasting's request on August 13, 1981 (California Broadcasting Exhibit A-77, A-78) that the financial settlement had not been completed. The signed agreement was executed by Andrews and his ex-wife three days later, August 16, 1981, and this was not provided to California Broadcasting.

59. At the Phase II hearing, Andrews questioned whether this was an "agreement" (Tr. 1838). However, the document was titled agreement and Andrews sought approval of payments pursuant thereto from the Bankruptcy Court (Tr. 1851-53). Andrews himself referred to the document as an "agreement" several times (Tr. 1545, 1835, 2281).

60. Andrews testified he felt obligated to his former wife for the transfer of assets listed in the "agreement" document (Tr. 1848, 1855). In fact, Andrews paid his ex-wife $30,000 in August, 1981 and $70,000 in May, 1982 (Tr. 1854, 1857).

61. Andrews was asked in the Phase I hearing why he promised Voiss 10% of the RAP stock and he then stated it was because of services Voiss had performed for the company (Tr. 882-83). At the Phase II hearing, Andrews stated Voiss had been promised the stock because Voiss offered to "save" him financially by attempting to help him obtain an $800,000 loan from First Interstate in 1981 (Tr. 1546).

62. Channel Islands filed its Proposed Findings on December 22, 1981 on the Phase I proceeding and urged the financial issue against it be resolved favorably. Channel Islands relied upon Andrews' $8,935,000 in net assets as reported in the January 31, 1981 Statement of Net Assets (Channel Islands Findings Phase I, pp. 10, 67).

63. On March 31, 1982, Andrews and Voiss entered into an Installment Sale Agreement in return for Voiss' agreement to forego his 20% interest

in the *Meredith* settlement (purchased from Andrews in January, 1981). Andrews promised to pay Voiss $450,000 within one year (California Broadcasting Exhibit A-49). Andrews secured the note by executing a deed of trust on the Oxnard Shores property in Voiss' favor. Andrews' signature was notarized on March 31 and the deed was recorded five days later (California Broadcasting Exhibit 50). These events were not reported to the Commission and no documents relating to the Installment Sale Agreement were produced by Channel Islands pursuant to a request for documents (Tr. 2422).

64. At an Andrews deposition on November 29, 1982, Andrews did not recall the Voiss deed of trust on the Oxnard Shores property the previous March (California Broadcasting Exhibit A-55). Andrews also testified that Voiss had relinquished his interests in the *Meredith* settlement by letter some eight months prior to the deposition. At the Phase II hearing, Andrews said he had turned this letter over to his bankruptcy attorney, Robert Greenfield. Greenfield's office denied knowledge of such a letter. The Presiding Officer ordered Channel Islands to produce the letter. The letter was not produced (Tr. 1935). Andrews also testified in the Phase II hearing that he never produced the Andrews-Voiss Installment Sale Agreement because he did not consider it "a valid agreement" because it had not been approved by the Bankruptcy Court (Tr. 1913). However, the record shows that the deed of trust which was a part of the Installment Sale Agreement was signed by Andrews, recorded, and that Voiss did not receive any payments from the *Meredith* settlement in 1982 (Tr. 1926).

65. On March 31, 1982, the same day that Andrews and Voiss executed the Installment Sale Agreement, Voiss executed Articles of Incorporation for Ralph Andrews/Tom Voiss Productions, Inc., a television program production company. Andrews was listed as an officer and director of this new corporation (California Broadcasting Exhibit A-51). This interest was not reported to the Commission. At the Phase II hearing, Andrews denied that he had become an officer and director of a corporation with Voiss "at that time" (Tr. 1919-20). Andrews was then shown a copy of the Articles of Incorporation and Andrews stated this was the "first time I'm aware of this" (Tr. 1920-21). Then he said Voiss had told him "days ago" that "he had done it" (Tr. 1922).

Failure to Report Judgments and Tax Liens

66. Channel Islands filed its application in January, 1979 and Andrews testified in the Phase I hearing that he was aware that pending judgments were required to be reported to the Commission (Tr. 998). He was also aware during this time that material changes in the application are required to be reported (Tr. 998-99). Andrews confirmed these statements at the Phase II hearing (Tr. 1777). The Channel Islands application, as originally filed reported that there were no outstanding judgments

against any party to the application. However, at the time the Channel Islands application was filed, there was an unsatisfied judgment against Andrews in favor of *West Credit Corporation* (Channel Islands Exhibit 24, p. 2; California Broadcasting Exhibits 16, p. 11 and 11; Tr. 1027, 1030-31).[17]

67. At the Phase I hearing, Andrews stated that the *West Credit* judgment was not reported because he believed that judgment had been settled, that his attorneys failed to report it and that the matter was insignificant and inadvertent (Channel Islands Exhibit 24, p. 2; Tr. 1036-37, 1033, 1118, 1011, 1058, 1063, 1091, 1025-26, 1070, 1116).

68. At the Phase II hearing, Andrews maintained that he did not consider the *West Credit* judgment to be a significant matter to be reported to the Commission and he assumed the judgment had been paid (Tr. 1829). In an Andrews affidavit supporting Channel Islands' opposition to the California Broadcasting Motion to Enlarge Issues, Andrews stated the *West Credit* judgment had been "satisfied". Andrews stated at the Phase II hearing that he (Andrews) did not owe anything to *West Credit* as of that date (Tr. 2328). At this point, note is made of the various terms used by Andrews to describe his lack of any obligation to *West Credit.* He stated the judgment has been settled, been paid, satisfied and that he owed nothing to *West Credit.*

69. Andrews was then asked to review documents which showed the *West Credit* judgment had been assigned to the Title Insurance and Trust Company in March, 1981, that Title Insurance had contacted Andrews in the fall of that year and that Title Insurance had filed a proof of claim in Andrews' Chapter XI proceeding (California Broadcasting Exhibits A-87, A-89). Andrews testified that he had never seen the Title Insurance documents before and could recall no conversations with representatives of Title Insurance (Tr. 2330-36).

70. Andrews continued to maintain that he had no knowledge of the *West Credit* judgment except that it had been paid, and that he did not know he was still responsible for this debt, only now to Title Insurance (Tr. 2331-32). He also denied ever having agreed to settle with Title Insurance (Tr. 2331-32). Andrews was then shown two letters addressed to him from Title Insurance dated June 30, 1981 and August 3, 1981. These letters indicated that Andrews and a lawyer discussed on the telephone that the *West Credit* judgment had been purchased by Title Insurance and that Andrews had agreed to pay $20,000 to Title Insurance by August 1 — later extended to August 10 — in full settlement of the judgment (California Broadcasting Exhibits A-90, A-91). Andrews said he had never seen these letters before (Tr. 2334-35). Andrews was asked to

[17] A *Meredith* cross claim alleging unfair competition was also pending (Channel Islands Exhibit 24; Tr. 1055-56).

explain his use of the term "satisfaction" of the *West Credit* judgment in his affidavit (California Broadcasting Exhibit A-71). Andrews said he "apparently had been indulging in some subconcious wishful thinking" and that he was "extremely embarras[ed]" (Tr. 2642-43). Thereafter, Andrews did describe his clear recollection that *West Credit's* counsel had informed him of the assignment of the *West Credit* judgment and that he had discussions with counsel for Title Insurance about the assignment and proposed settlement (Tr. 2645, 2647). He termed his telephone conversation with counsel for Title Insurance as "shocking" and recalled the attorney's name — Victor George (Tr. 2645). Andrews' testimony as the *West Credit* matter concluded with his observation: "I somehow just blocked the truth out in this * * * I am not sure that is the full explanation, but I am deeply sorry for the whole situation." (Tr. 2646).

71. During the Phase I hearing, Andrews was asked if there were any unreported judgments. Andrews stated that he had made every effort to examine this memory, accounts and business and that "I didn't have that many judgments". At the time Andrews gave this testimony, he had two additional, i.e., in addition to *West Credit*, judgments against him.

72. Andrews signed a Stipulation for Judgment and Order in the case of *Evaleen Saquin* v. *Ralph Andrews* on May 14, 1979 (Tr. 1794-95). That Judgment was in favor of Saquin in the amount of $3,128.25 and was entered on August 10, 1979. An abstract of judgment was issued June 19, 1980 and recorded July 1, 1980 (California Broadcasting Exhibit A-42).

73. Andrews signed an affidavit which was included with the Channel Islands Opposition to a California Broadcasting Petition to Enlarge Issues. Andrews stated that the *Saquin* judgment had been "included in the current liabilities listed on my Financial Statement dated 1/31/82 [sic]." (California Broadcasting Exhibit A-73, p. 4). Andrews explained his failure to report this as an "oversight" and that it certainly was nothing he wanted to "conceal" (California Broadcasting Exhibit A-125; Tr. 2849-50). Andrews believed the *Saquin* judgment was included in his January, 1981 Statement of Net Assets under the heading "Accounts Payable" (Tr. 1861). However, he knew the judgment should have been reported separately (Tr. 1867, 1869).

74. California Broadcasting requested production of the documents used by Sid Silverman to prepare Andrews' 1981 Statement of Net Assets (California Broadcasting Exhibit A-99). There is no reference in those documents to the *Saquin* judgment. Then Andrews stated, the *Saquin* judgment, while not mentioned by name, was included under the entry "various other accounts payable $15,615" on one of Silverman's work-sheets (Tr. 1904; California Broadcasting Exhibit A-48, p. 7). The backup documents were requested in August, 1981 for the $15,615 entry by Silverman, but Channel Islands did not respond to this request. Again, in

1982, California Broadcasting again requested all documents relating to the *Saquin* judgment. This time, Channel Islands produced a Silverman worksheet which did list an amount of $1,900 "due to Saquin"[18] (California Broadcasting Exhibit A-47). However, a number of documents attached to the worksheet were dated several months after the January 31, 1981 Statement of Net Assets was prepared. Silverman conceded the worksheet was not prepared until more than a year after the Statement of Net Assets was prepared (Tr. 2973, 2992). Silverman's explanation for not including the Saquin debt in the January 31, 1981 Statement of Net Assets was the need to prepare documentation as quickly as possible. Yet the amount then due Saquin, $1,673, was greater than a number of items that were listed by Silverman. For example: "Cable TV $100"; "Tel. & Util. $300"; and "Association Dues $100".

75. The same Mr. Silverman testified that his office also prepared a schedule of liabilities to be used in connection with Andrews' Statement of Affairs, filed with the Bankruptcy Court in December, 1982 (Tr. 3078-79). That statement was turned over to Andrews' bankruptcy counsel, John Read, and lists the amount due Saquin with the word "judgment" next to it (California Broadcasting Exhibit A-46). The statement filed with the Bankruptcy Court did not refer to the Saquin debt (California Broadcasting Exhibit A-46). Andrews could not explain this omission from his Statement of Affairs (Tr. 1871; California Broadcasting Exhibit A-46, p. 7).

76. At the Phase II hearing, Andrews stated that the "Statement of Affairs" as filed with the Bankruptcy Court in December, 1981 had been brought up to date "by several later submissions" (Tr. 1872). Andrews' present bankruptcy counsel said no amendments to the Statement have been filed (Tr. 1873). Andrews signed an oath under penalty of perjury that the Statement filed with the Bankruptcy Court reported all his debts (California Broadcasting Exhibit A-46, p. 15).[19]

77. Andrews sought to avoid his failure to report to the FCC the *Saquin* judgment under his assumption that the law firm that handled this matter for him — Simon & Sheridan — would "automatically" report the matter to the Commission and that it must have been an "inter-office goof-up at the law firm" (Tr. 2631). He also offered as excuses that this was "an incredibly chaotic" and "emotional" time in his life (Tr. 1866), that he believed the matter had been "taken care of" by settlement agreement (Tr. 1868) and that he was occupied with other matters "particularly in 1981" (Tr. 2846).

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[18] This worksheet was not produced in 1981.

[19] While California Broadcasting Exhibit A-46, p. 15 does not contain Andrews' signature, Andrews admitted that he did sign the document (Tr. 1870-71).

78. The Directors Guild of America filed suit against RAP and attached royalty payments allegedly due Andrews. Andrews filed a third-party claim on January 25, 1979, in an effort to have the royalties paid to him rather than the plaintiff (Tr. 1781). On March 22, 1979, the Superior Court of California denied the third-party claim and held plaintiffs entitled to recover from Andrews, as an individual, and RAP in the amount of $535.60 (Tr. 1782). Judgment was issued January 29, 1980 and recorded January 31, 1980 (California Broadcasting Exhibit A-115). The abstract was also recorded on March 14, 1980 (California Broadcasting Exhibit A-108, p. 5).

79. At the Phase II hearing, Andrews said he was not aware of the *Directors Guild* judgment at the time it was entered. He later admitted that he had seen the court's order about the time it was issued (Tr. 1782). Next, Andrews said the judgment was not against him personally (Tr. 1864-65). But a document produced by Andrews' attorney, John Read, shows that an abstract of judgment (against RAP and Andrews as an individual) was recorded in connection with the Andrews beach house in March, 1980 (California Broadcasting Exhibit A-108, p. 5).

Federal Tax Liens

80. Andrews did recall having seen a copy of a Notice of Federal Tax Lien mailed to him in December, 1980 (California Broadcasting Exhibit A-44; Tr. 1807). Channel Islands did not report the existence of any tax lien, as such, to the Commission. Andrews claims that the amounts due on the tax liens were included in his financial statement under the entry "Taxes Payable — Estimated $16,000" (Tr. 1865).

81. No facts or conclusions can be made relative to the inclusion of tax liens in the "Taxes Payable — Estimated" entry. Channel Islands produced some documents in 1981 relative to this entry. However, additional documents were produced in 1982 and no explanation was ever provided why these documents were not also produced in 1981. It is claimed that all the documents were prepared in early 1981, but, the documents produced in 1982 are entirely different from those produced in 1981 and contain unrelated numbers. The only explanation provided by Silverman is that his office was disorganized (California Broadcasting Exhibits A-74, A-75; Tr. 3016-17, 3028-29).

Failure to Produce Documents

82. After the issues in this proceeding were enlarged on May 1, 1981, California Broadcasting submitted a revised motion for production of documents from Channel Islands. This motion to produce was the subject of lengthy discussion at a prehearing conference held on June 30, 1981 wherein California Broadcasting made certain modifications in the request for documents. Channel Islands made its objection and rulings were

made on the record. Based upon the record rulings with respect to the production of documents, Channel Islands was required to produce the following documents:

> All documents which appraised or assessed the current value of the assets of Channel Islands' subscribers;
>
> All documents referring or relating to any encumbrances on such assets;
>
> All documents which showed whether such assets are solely or jointly owned;
>
> All documents referring or relating to Channel Islands' obligation to report information required to be disclosed in the application, including communications with shareholders, instructions to principals, and documents relating to Andrews' search of his records; and
>
> All documents relating to the satisfaction of the *West Credit* judgment (California Broadcasting Exhibit A-102, pp. 16, 18-19).

83. With respect to Mr. Andrews, the record shows that his counsel sent him a copy of the California Broadcasting motion to produce on June 24, 1981 and the transmittal letter advised Andrews, his agents and attorneys, that "the document requests should be broadly construed" (California Broadcasting Exhibit A-97, p. 1; Tr. 1570). The following week, Channel Islands responded to the California Broadcasting request for production, but the following documents were not produced:

> Copies of the Rofeh deeds of trust were not produced to California Broadcasting until December, 1982. Tr. 2443, 2464; California Broadcasting Exhibits A-37, A-38.[20] Nor was any indication given by Channel Islands that such documents existed, although the deed of trust on Oxnard Shores was executed only the week before;
>
> Copies of the Hurwitz deeds of trust were not produced. Tr. 2464; California Broadcasting Exhibit A-81;
>
> No document concerning Rush's actual interest in the Oxnard Shores property was produced in 1981. Tr. 2416, 2421; California Broadcasting Exhibits A-29, A-67, A-109. The Tenancy in Common Agreement, which showed that Rush had a 50 percent interest in Oxnard Shores was in the possession of Andrews or his agents and was finally produced in 1982. Tr. 2416, 2421.;
>
> No documents referring to Andrews' defaults on the beach house and Oxnard Shores property were produced. Tr. 2469; California Broadcasting Exhibit A-117;
>
> No documents referring to foreclosure on Andrews' beach house were produced. Tr. 2423-24, 2443, 2469; California Broadcasting Exhibits A-105, A-107, A-117. These documents include correspondence between Andrews and Channel Islands' California counsel. They were not identified and were not produced until 1982. Tr. 2443;
>
> A letter from Hurwitz's attorney to Alan Block, Andrews' attorney, which threatened foreclosure on the Oxnard Shores property was not produced. Andrews' affidavit to the Coastal Commission referencing the threatened foreclosure was not produced. California Broadcasting Exhibit A-84; Tr. 2291; and
>
> No documents relating to the "various other accounts payable" section of Andrews' Statement of Net Assets were produced in 1981. California Broadcasting Exhibits A-

[20] Andrews claimed at the Phase II hearing that he either did not have copies in his possession or he forgot about them (Tr. 2249).

47, A-99. Documents allegedly showing that the *Saquin* judgment was accounted for in that section were produced by Channel Islands in 1982.

84. After Andrews' deposition, California Broadcasting sent a letter to Channel Islands on August 4, 1981 listing documents which Andrews had been requested to produce at the deposition, including:

> Documents which reflected Andrews' liability or potential liability to his former wife in connection with their divorce proceeding. Although a handwritten agreement between Andrews and his wife was entered two weeks later, it was not produced;
>
> Documents reflecting the fact that Rush had made the annual Oxnard Shores property payment in 1981. Andrews produced a check showing he had made the payment, but stated that Rush had paid "a like amount;" and
>
> Documents showing what liabilities were reflected in "various other accounts payable $15,615" entry in Silverman's worksheet. California Broadcasting Exhibit A-58, p. 7 (California Broadcasting Exhibits A-77, A-78).

85. California Broadcasting filed a motion for production of documents from Channel Islands on October 29, 1982 which was further defined and limited by the parties on November 8, 1982 and the California Broadcasting motion for production was granted the next day. California Broadcasting requested the production of documents relating to liens on the Oxnard Shores property, liens on the beach house and the efforts of Channel Islands and its principals and agents to produce documents in 1981 (California Broadcasting Exhibit A-101).

86. The Installment Sale Agreement, the $450,000 promissory note and the deed of trust in favor of Voiss were not produced until Andrews' deposition in December, 1982 and thereafter (Tr. 2422) although Andrews kept the Installment Sale Agreement in his desk drawer (Tr. 1931). Channel Islands never produced correspondence between its Washington counsel and Andrews and the other shareholders about California Broadcasting's 1981 requests until after the deposition of Channel Islands' former Washington counsel — Raymond Bender (Tr. 2426-27). The Hurwitz and Rofeh deeds of trust (California Broadcasting Exhibits A-37, A-38, A-81) were not produced (Tr. 2443, 2469).

87. Channel Islands did produce some of the memoranda in 1981 which reminded the Channel Islands' shareholders of the reporting requirements, but, six additional such memos were not produced until after the deposition of Channel Islands' former Washington counsel (California Broadcasting Exhibits A-110, A-111, A-112, A-113, A-114, A-95; Tr. 2465).

88. Andrews testified that in response to the 1981 document request from California Broadcasting, he searched his records, files and drawers of his desk for anything that might be responsive and that he was assisted in this search by Al Hustedt, an employee of Andrews' California counsel — Simon & Sheridan (Tr. 1571). Andrews stated that Hustedt asked both Silverman (Andrews' accountant) and counsel for relevant documents (Tr. 1573) and that he (Andrews) had specific recall of Hustedt's assistance in

1981 (Tr. 1574). Andrews did not personally seek out any of the agents of Channel Islands in the search for documents as the only person he talked to was Hustedt (Tr. 1576). This Andrews testimony was taken on January 18, 1983. The following day, Andrews was advised by California Broadcasting counsel that Andrews in his previous response to an interrogatory re the names of persons involved in the 1981 production of documents did not mention Mr. Hustedt (California Broadcasting Exhibits A-33, A-35; Tr. 1631-34). Andrews continued to maintain that Mr. Hustedt had been involved as he had previously testified. However, when it was suggested that based upon the interrogatory response, Mr. Hustedt might not have been involved, Andrews indicated that he could not distinguish between the production efforts made by him and others on his behalf, in the two years, i.e., the 1981 and the 1982 production requests. Andrews did recall that Hustedt did not come to the building in which Andrews had his office in 1981 (Tr. 1650). Next, Andrews said that it was his secretary who searched his files in 1981 for documents responsive to the California Broadcasting request and, that he had talked by telephone with either Al Hustedt or Irv Gross, an attorney with Simon & Sheridan and reviewed the California Broadcasting revised motion for responsive documents (Tr. 2542). Andrews again stated that he searched his desk for responsive documents (Tr. 2542). Andrews then admitted that Al Hustedt was not involved in the 1981 production effort (Tr. 2542-43).

89. The Channel Islands efforts with respect to the 1982 California Broadcasting motion for production of documents is next considered. Andrews said he took essentially the same actions as he had in 1981. He instructed his secretary to look at the files, he looked through his desk drawers. Al Hustedt came to his office on several occasions and spoke with Andrews' secretary and Hustedt personally looked at some of the files (Tr. 2606-07). Andrews reviewed the documents found by his secretary and stated that "[m]y desk was carefully searched * * *" (Tr. 2607). Andrews stated that he was under instructions from Al Hustedt and William Simon to include documents he was unsure of in response to the document request and if there was any doubt, it should be included (Tr. 2558). Andrews' response on the issue of production of documents was as follows:

> Every document that I had in my possession that you requested, you got immediately after you requested it. So, if you did not get a document that you requested, you can assume correctly that I did not have it in my possession or in my control [Tr. 1484].

90. Andrews has not explained in the record why, in spite of his careful search, the following documents were not produced:

> Andrews' defaults and the foreclosure proceedings on his beach house and condominium;
>
> Andrews' missed payments on Oxnard Shores, threats to foreclose on that property, and a new deed of trust in favor of Hurwitz;

Andrews' purchase of the Tiffany lamps from Rofeh, including the various related encumbrances placed on his assets;

Simon's deed of trust;

The assignment of the *West Credit* judgment; and

Andrews' property settlement agreement with his ex-wife.

91. This concludes the findings of fact on the Phase II issues. Next will be considered the financial issue against Channel Islands and the comparative evaluation of California Broadcasting and Channel Islands. Since the Phase II record reflects some modification of the facts on those issues, both the records in the Phase I and Phase II proceedings will be considered. Such consideration will only deal with the facts as now amended or revised.

The Financial Issue

92. By *Memorandum Opinion and Order* released May 1, 1981, the following financial issue was specified:

To determine with respect to Channel Islands' financial showing, the reasonable availability of the funds relied on, and whether the applicant is financially qualified to construct and operate the station.

93. By way of background, the Channel Islands application before designation for hearing, contained only the unsupported statement of the net liquid assets of each stock subscriber. No information was provided which would provide any support for the availability of such funds. Based on the unsupported claim of net assets, the application, prior to designation, appeared to show that the stock subscribers had a total of $1,114,000 in net liquid assets to meet the $400,000 in subscription agreements. By post-designation amendments filed by Channel Islands it appeared that there was only a total of $48,278 in liquid assets. It also appeared that a bank loan letter had placed reliance on the claimed net liquid assets in excess of $1.1 million plus the total worth of the 20 Channel Islands stock subscribers in excess of $12 million. The application of Channel Islands showed no support for either the claimed net liquid assets or the total net worth. There was extensive evidence taken on the financial issue during the Phase I proceeding. However, in large part such evidence is not now considered. At a prehearing conference in October, 1982, prior to the Phase II proceeding, the Presiding Judge, in the light of a recent Review Board decision,[21] afforded Channel Islands the opportunity to further amend its financial proposal. Channel Islands did file an amendment to its financial proposal which amendment was accepted by *Order* released January 21, 1983.

94. The original Channel Islands proposal would require $1,200,495 to construct and operate the proposed station for three months. To meet

[21] *Bison City Television*, 91 FCC 2d 26 (1982).

these costs, Channel Islands then proposed to rely on $400,000 in capital contributions from its 20 shareholders, plus the proceeds of a $1.7 million loan to Channel Islands from the United California Bank, at Los Angeles, California (Channel Islands exhibit 26, second p. 7).

95. The Channel Islands financial proposal as now amended is based upon a letter from the First Interstate Bank of California (Channel Islands Exhibit 32). Construction and operating costs are estimated at slightly in excess of $1.5 million. The letter from First Interstate Bank dated November 24, 1982, states the bank's "willingness to lend Channel Islands *** up to $2,000,000" to meet its estimated costs. The bank letter states that it is aware of Andrews' filing under Chapter XI and was advised that a Plan of Reorganization would be filed "within the next several weeks" (Channel Islands Exhibit 32, pp. 3, 7-10). To secure the loan, Channel Islands would be required to secure the pledge of each stockholder of his or her stock and a guarantee of each shareholder of his or her prorated share of the loan (*Id.* p.8). The bank letter also provided that if Andrews' collateral was not timely forthcoming, the bank would accept Harold Rosebrugh's guarantee of Andrews' pro rata share (*Id.*, p. 9). Finally, the loan would be conditioned on the submission of a formal loan application and a final review of Channel Islands' financial situation at the time of the application (*Id.*)

96. Thomas Hodgins, the bank officer who signed the November, 1982 letter was a witness in this proceeding. Hodgins stated that the bank reviews an individual's financial statement when it considers a loan (Tr. 2744). Hodgins had received copies of Andrews' January 31, 1981 Statement of Net Assets (California Broadcasting Exhibit 8, pp. 3-5) as well as his Statement of Net Assets dated November, 1982 (California Broadcasting Exhibit A-93; Tr. 2342, 2476). Hodgins also was in receipt of a representation from Dr. Arthur Schechter, President of Channel Islands, that the situation of 13 of the Channel Islands stockholders had not changed from 1981 (Tr. 2736-37).

97. The bank letter stated that Andrews would be an acceptable guarantor with a pledge of his ownership interest in the Oxnard Shores property and the lien payments due Andrews on the *Meredith* settlement which was represented in a letter to Hodgins from William Simon dated November 28, 1982 as having a total value of $1,023,371 (Channel Islands Exhibit 32, p. 8; Tr. 2750). The Simon letter to Hodgins did not show the Thomas Voiss interest in the *Meredith* settlement and it showed Andrews as the 100% owner of RAP (Tr. 2751).

98. The bank did receive a letter from Harold Rosebrugh to indicate that Rosebrugh was willing to guarantee the entire $2 million loan to Channel Islands. At the time of Rosebrugh's testimony, Rosebrugh was a 5% shareholder in Channel Islands (Tr. 2692). Rosebrugh's offer to

guarantee the entire $2 million loan was based on his review of Andrews' November, 1982 Statement of Assets and the fact that Rosebrugh was aware of a strong likelihood of Andrews obtaining substantial income from the airing of a new television show to be syndicated by RAP (Channel Islands Exhibit 32, pp. 31-32; California Broadcasting Exhibit A-93; Tr. 2700).

99. Regarding Andrews' November, 1982 Statement of Assets, the statement assumed a value on the Oxnard Shores property of $5.6 million, an amount based on the approval by the Coastal Commission of development of 14 lots instead of 10 lots. At the time the November, 1982 Statement was prepared, the Coastal Commission had rejected Andrews' proposal for 14 lots (Tr. 2348). At the time the property was being offered for sale at $4.5 million. A sale at this price would result in Andrews' interest in the Oxnard Shores property being over $500,000 less than shown in the statement (Tr. 2349). The property is currently listed at $4.5 million (Tr. 1502) and Andrews has never received an offer for over $4.25 million (Tr. 1509).

100. Two days after the date of the November, 1982 Andrews Statement of Net Assets, Andrews signed a final marital settlement agreement with his former wife for submission to the Bankruptcy Court (Channel Islands Exhibit 29). Pursuant to that agreement, his former wife is entitled to a $200,000 deed of trust secured by the Oxnard Shores property and one-seventh of his interest in Minera d'Oro (Channel Islands Exhibit 29; Tr. 2349-50).

101. The Thomas Voiss $450,000 deed of trust, recorded in April, 1982 and secured by the Oxnard Shores property was not reflected in Andrews' November, 1982 Statement of Net Assets. Andrews said that pursuant to a "handshake agreement" with Voiss, the Installment Sale Agreement with Voiss no longer existed (Tr. 2350) but there is no documentary evidence to support this statement and Channel Islands did not call Voiss as a witness.

102. The November, 1982 Andrews Statement of Net Assets showed Andrews as the 100% owner of RAP (California Broadcasting Exhibit A-93, p. 8), even though he had promised to give 20% to his former wife and Voiss (Tr. 2351-52) and on the date of the hearing, Andrews had promised a one-third interest in RAP to Voiss (Tr. 1545).

103. Hodgins indicated that he did not have the authority to approve a $2 million loan to Channel Islands, as this would be done by other persons in the bank. No loan had yet been approved and that before issuing a loan, the bank would require information on construction costs, equipment financing, expected revenues, shareholder assets and liabilities (Tr. 2723-25, 2742). Hodgins further testified that the bank has never approved a

loan to a new corporation whose majority stockholder was in Chapter XI proceedings (Tr. 2732).

104. The bank letter is dependent on a stock pledge by all the Channel Islands shareholders. As of the date this record was closed, Ben Nordman had not indicated his willingness to pledge his stock for the purpose of aiding Channel Islands to obtain the $2 million First Interstate loan (Channel Islands Exhibit 32, p. 27).

105. Channel Islands also now relies in its financial proposal on a second letter from the Harris Corporation to finance the purchase of equipment (Channel Islands Exhibit 32, p. 5). The Harris letter is signed by T. R. O'Hara, District Manager, Television RF Sales for the corporation. O'Hara does not oversee operation of the credit department (Channel Islands Exhibit 32, p. 4).

106. On November 24, 1982, O'Hara had a telephone conversation with William Simon concerning Channel Islands' equipment proposal. Simon requested a new letter. After this telephone call, Mr. Simon sent information to O'Hara concerning the financial condition of Channel Islands' stockholders and this information was forwarded by O'Hara to Harris' credit department at Owing, Illinois. O'Hara was advised prior to his deposition by the Harris Corporation to "Stand by" the November, 1982 Harris letter to Channel Islands as written. O'Hara understood that this "Stand by" authorization was based on the shareholders' financial information and that the information was accurate and complete (Channel Islands Exhibit 25, pp. 9, 11, 15-17). O'Hara was not aware of any instance in which Harris had extended $1 million in credit to a company whose majority stockholder was in Chapter XI bankruptcy proceedings (Channel Islands Exhibit 25, p. 20).

107. There is also a difference in the two Harris letters. The August, 1981 Harris letter stated that Harris had reviewed the financial information supplied by the applicant (Channel Islands) and that Harris had completed a credit verification. Accordingly, the Harris August, 1981 letter concluded that "for the purposes of FCC consideration, Channel Islands Television Corporation in the view of Harris, does hereby have reasonable assurance of the availability of the financing contemplated" (Channel Islands Exhibit 25, p. 11). The November, 1982 letter does not contain such language. It states "Acceptable credit verification" will be required at some time in the future (Channel Islands Exhibit 32, Attachment 1).[22]

[22] As pointed out in the findings of fact relative to the Andrews submission of his Statement of Net Assets to the bank, the Andrews 1982 financial statement was not complete.

The Comparative Issue

California Broadcasting's Integration of Ownership and Management

108. California Broadcasting was formed in late 1978 (California Broadcasting Exhibit 1, p. 5). Harry L. Keiffer is a director and the President of California Broadcasting. The other officers and directors are members of his immediate family. His wife, Delores, is a director, a Vice-President and the Secretary-Treasurer, his son, Stephen, is a director and a Vice-President. Mr. Keiffer is the sole stockholder of California Broadcasting (California Broadcasting Exhibit 1, p. 1; Tr. 687).

109. Harry L. Keiffer, the 100% owner and President of California Broadcasting proposes to work at the station full-time (50 hours or more per week) (California Broadcasting Exhibit 1, pp. 1, 9). Mr. Keiffer will have the ultimate responsibility for all aspects of the station's operations and will be directly involved in the financial, business and public affairs areas (California Broadcasting Exhibit 1, pp. 9-10).

110. Mr. Keiffer's home since 1967 is, with some explanation, in Agoura, California, in Ventura County and within the proposed service area of the station (California Broadcasting Exhibit 1, pp. 1, 3; Tr. 665, 672, 688). He has been a registered voter in Ventura County since 1967 and he pays taxes there and the Agoura address is on his driver's license (California Broadcasting Exhibit 1, p. 6; Tr. 670, 688).

111. However, in the fall of 1978, Mr. Keiffer began living at accommodations he describes as temporary at Lancaster, California. His business, A & K Developments, Inc. (A & K) was building houses on a tract of land in the Lancaster area at the time. Mr. Keiffer stated he found it more convenient to live in one of his Lancaster houses rather than to commute there from his home in Agoura, 80 miles away (California Broadcasting Exhibit 1, p. 5; Tr. 669, 671-72). Mr. Keiffer has been living in one of his Lancaster houses since late 1978. During this time, Mr. Keiffer has stayed 3-4 nights a month on the average in his Agoura home (California Broadcasting Exhibit 1, p. 5; Tr. 673). Mr. Keiffer states that he continues to have his corporate and personal attorney in Ventura City and his insurance agent continues to be in Ventura County (Tr. 673). It is Mr. Keiffer's testimony that once the Lancaster housing project is completed, he intends to return to Ventura County (Tr. 688). In the beginning of 1981, Mr. Keiffer placed his Agoura home up for sale. Mr. Keiffer states he will use the proceeds from this sale to build a house in the City of Ventura (California Broadcasting Exhibit 1, p. 5).

112. Mr. Keiffer was Treasurer of the City of Ventura from 1969 to 1973 and during these years he was in contact with various civic and business leaders (California Broadcasting Exhibit 1, pp. 3-4). During this same time period (1969-1973), he was a director of the City of San

Buenaventura Employee's Association and a director of the Public Employee Association of Ventura County. He has also, in this same time period, been associated with business and consumer groups and participated in local functions, all in Ventura County (California Broadcasting Exhibit 1, p. 7; Tr. 685-87). In 1971, Mr. Keiffer was a candidate for election to the school board of the Simi Valley Unified School District and in 1976, he helped to institute a study of the needs of the City of Thousand Oaks. Both Simi Valley and Thousand Oaks are within the Grade A coverage of California Broadcasting's proposed station (California Broadcasting Exhibit 1, p. 7; Exhibit 2, Figure 1).

113. Mr. Keiffer has no past broadcast experience. He has been a successful executive in the banking and real estate fields (California Broadcasting Exhibit 1, p. 8).

114. Mr. Keiffer became the 100% owner of A & K in 1977. A & K began as a housing developer in Ventura County (California Broadcasting Exhibit 1, p. 5). It is Mr. Keiffer's testimony that since becoming involved in the California Broadcasting application, he has diminished his A & K activities so that his duties at A & K will not interfere with his full-time duties at California Broadcasting. Mr. Keiffer has no other business activities (California Broadcasting Exhibit 1, p. 6; Tr. 681).

California Broadcasting Diversification

115. Neither California Broadcasting, its officers, directors or shareholders have other interests in any media of mass communication (California Broadcasting Exhibit 1, p. 8).

Channel Islands Integration of Ownership and Management

116. Channel Islands has reported changes in the shareholders' respective ownership percentages from the time it filed its original application. The following table reflects such changes:

	*July 1980**	*August 1981***	*April 1983****
H. Andrews ****	3%	3%	2.5%
R. Andrews ****	50.1	50.1	50.1
H. Conant	2.5	2.5	2.08
S. Conant	2.5	2.5	2.08
A. Escalante ****	5	6	4.5
M. Escalante ****	5	6	4.5
C. Harris	2	2	2
V. Kato ****	3	3	2
B. Nordman	1	1	.66
B. Paranay ****	1.9	1.9	1.58
L. Reisman ****	2	2.5	1.66
R. Reisman	2	2.5	1.66
H. Rosebrugh	3	5	13.8
D. Rude	3	1.5	1.5
G. Rude	3	1.5	1.5

A. Schechter	2	3	2.66
D. Schechter	2	3	2.66
J. Steinhardt ****	2	3	2.5
D. Boyce	2.5	—	—
S. Dulzea	2.5	—	—

* July 18, 1980 Amendment to Channel Islands application.

** August 20, 1981 Amendment to Channel Islands application (accepted in part by *Order*, FCC 81M-2738).

*** April 18, 1983 Amendment to Channel Islands application.

**** Stockholders for whom Channel Islands has sought comparative credit.

117. Mr. Ralph H. Andrews, President and a director of Channel Islands has subscribed to 20,040 (or 50.1%) shares of its outstanding stock.[23] He proposes to work full-time as the General Manager of the station. As General Manager, Mr. Andrews will supervise all phases of programming, advertising, community relations and all the other normal functions the position requires (Channel Islands Exhibit 20, p. 1).

118. Mr. Andrews has not held a management position at a broadcast station but he does have experience in the broadcast field. He has worked as a radio announcer (Channel Islands Exhibit 21). He and his wholly-owned company, Ralph Andrews Productions, Inc. (RAP)[24] have produced a substantial amount of syndicated television programming (Channel Islands Exhibit 21).

119. Mr. Andrews originally proposed to move to Ventura County (Channel Islands Exhibit 20; Tr. 942) and he would live in the beach house in Oxnard, California which is within the Channel Islands proposed service area (Tr. 909-10, 992). However, as developed *supra,* the beach house has now been foreclosed and Mr. Andrews no longer has a beach house. It appears that Mr. Andrews is now living at a condominium, which is foreclosed upon, and he is now living in Studio City, California (Channel Islands Exhibit 29, p. 1). As matters now stand, the record reflects no residence within the Channel Islands service area that Andrews would move to.

120. At the Phase I hearing, Andrews detailed his plans to reduce his obligations to RAP and described how he would turn over the day-to-day management of RAP to Thomas Voiss, including making Voiss a Vice-President of the company, and to George Vossberg (Tr. 879-80). At the Phase II hearing, in connection with Andrews' testimony on the financial irresponsibility issue, Andrews testified that the RAP bankruptcy (Chap-

[23] Mr. Andrews has paid for the stock.

[24] For the purposes here under concern, RAP is considered wholly-owned by Mr. Andrews. As developed *supra*, both Voiss and Andrews' former wife have or will have 10% each of RAP.

ter XI) was largely the result of his prolonged absence from the company. Also, Andrews no longer proposes Voiss' involvement with RAP (Tr. 2532-34). Mr. Andrews does not show any civic participation in Ventura County, other than membership in the Oxnard Shores Community Association and counsel conceded that Mr. Andrews could not get credit for civic participation in the service area (Tr. 963-64).

121. Mr. Herrick Andrews, son of Ralph Andrews, is Secretary and a director of Channel Islands. His original proposal to have 3% of the stock in Channel Islands has now been reduced to 2.5% (Channel Islands Exhibit 1, p. 1 and amendment to the Channel Islands application).

122. Mr. H. Andrews proposes to work full-time at the station as Program Director (Channel Islands Exhibit 20, pp. 1-2). Mr. H. Andrews has never held a management level position in broadcasting but he does have some broadcast experience and he has been involved in program production (Channel Islands Exhibit 6, p. 1; Exhibit 21, pp. 5-7). Originally, Mr. H. Andrews planned to move to the City of Ventura (Channel Islands Exhibit 20, p. 1; Tr. 1167-68). The record shows that he did live at the beach house which has now been foreclosed.

123. Mr. Jeffrey Steinhardt was originally a 2% stockholder whose interest is now 2.5%. He proposes to work full-time as the Public Affairs and Community Services Manager. He will participate in ascertainment of community needs and the development of programming to meet those needs. He will also have a role in organizing and promoting the station's role in the community through various projects (Channel Islands Exhibit 20, p. 2; Channel Islands application as amended).

124. Mr. Steinhardt has no prior broadcast experience; has never lived in Ventura County, except for his brief stay in the beach house and has not participated in civic activities there (Channel Islands Exhibit 20, p. 2). Mr. Steinhardt is presently enrolled in chiropractor school and will graduate in approximately two years (Tr. 1181-82).

125. Bruce Paranay originally subscribed to 1.9% of the Channel Islands stock and his interest is now 1.58% (Channel Islands Exhibit 1, p. 2 and the Channel Islands application, as amended, see paragraph 116, *supra.*). Mr. Paranay proposes to work full-time as the Operations Manager of the station (Channel Islands Exhibit 20, p. 2). His duties will include coordination of programming, news, commercials, production and scheduling functions, supervision of technical employees, and assistance in the news operations (Channel Islands Exhibit 20, pp. 2-3).

126. Mr. Paranay has no past broadcast experience. He has worked with Herrick Andrews in the production of commercial programming but has not worked at a television station. While nothing is said about Mr. Paranay ever having resided in Ventura County or his interest to move there, the record does show that for a short period of time, he lived at the

beach house in Ventura County which has been foreclosed and sold (California Broadcasting Exhibit 12; Channel Islands Exhibit 20).

127. Mr. Paranay works two to three hours per day on his import-export business. He will continue this business if the Channel Islands application is granted and he explained that his present business utilizes his time so as not to interfere with his full-time Channel Islands duties (Tr. 1192-93).

Minority and Female Owners of Channel Islands

128. Manuel F. Escalante, Jr., originally subscribed to 5% of the Channel Islands stock, which interest has now been reduced to 4.5% (Channel Islands Exhibit 1, p. 1 and the Channel Islands application as amended, see paragraph 116, *supra.*). He is of Mexican-American descent (Channel Islands Exhibit 20, p. 3). While Mr. Escalante had conversations in early July, 1980 with Mr. Simon, there was no discussion of the hours Mr. Escalante would devote to the station. At best, he made a "commitment" to Mr. Simon "to devote some time to getting that application and to getting some interest in the community voiced on the television station" (Tr. 1283). He said he feels a moral obligation to work at the station but is not obligated to do anything for the station, other than buy the stock (Tr. 1285). In Channel Islands' Exhibit 20, p. 3, Mr. Escalante proposes to work at the station five hours per week.

129. Angela Escalante originally subscribed to 5% of the Channel Islands stock now reduced to 4.5% (Channel Islands Exhibit 1, p. 1 and the Channel Islands application as amended, see paragraph 116, *supra.*). She is not a member of any minority race (Tr. 543; Channel Islands Exhibit 20, pp. 3-4).[25]

130. Manuel F. Escalante, Jr. and Angela Escalante are husband and wife and they attended a meeting with Mr. Simon and Ralph Andrews on July 16, 1980. This was the only meeting prior to the "B" cut-off date (Tr. 1272). Angela Escalante made no commitment as to a specific amount of time being devoted to the station. In Channel Islands' Exhibit 20, pp. 3-4, she proposes to devote a minimum of five hours per week to the station.

131. K. Victor Kato originally subscribed to 3% of the Channel Islands stock which has now been reduced to 2% (Channel Islands Exhibit 1, p. 1 and the Channel Islands application as amended, see paragraph 116, *supra.*). He is of Japanese-American descent (Channel Islands Exhibit 28). Prior to the "B" cut-off date, July 18, 1980, Mr. Kato did not commit himself to any specific amount of time at the station other than he expected to devote "some time". Channel Islands Exhibit 20, p. 4 states that Mr. Kato will devote two hours per week to the station.

[25] Angela Escalante is considered in this special group insofar as there may accrue merit for female ownership (Tr. 544).

132. Lori Reisman originally subscribed to 2% of the Channel Islands stock which is now reduced to 1.66% of the stock (Channel Islands Exhibit 1, p. 2; and the Channel Islands application as amended, see paragraph 116, *supra.*). She is not a member of any minority race (Channel Islands Exhibit 20, p. 4). On July 16, 1980, two days prior to the "B" cut-off date, she attended a meeting to discuss various stockholders' participation in the station. Lori Reisman did not promise to devote any specific amount of time, other than she would like to devote time to the station (Tr. 1259). Channel Islands Exhibit 20, p. 4 proposes a minimum of two hours a week for her.[26]

Channel Islands Diversification

133. No officer, director or shareholder of Channel Islands has any interest in any broadcast station, newspaper or cable television company (Channel Islands Exhibit 22). Ralph Andrews does own a controlling interest in RAP, a television program production company. Through RAP, since 1963, he has created, developed and produced television pilots and game shows. One game show "You Don't Say" ran for seven years on NBC and during much of that time was the highest rated daytime show on all three networks (Channel Islands Exhibit 21, pp. 3-5). Mr. Ralph Andrews has developed other shows shown regularly on network television. His show "Celebrity Sweepstakes" ran for three years on NBC. "Liar's Club" developed in 1974 ran in most syndication markets for five years. In 1975, he sold "You Don't Say" to the ABC network. In 1977, he produced a syndicated one-hour special entitled "The Truth with Jack Anderson". Some of these shows are still on the air. He is currently executive producer of a pilot daytime game show entitled "Temptation" (Channel Islands Exhibit 21, pp. 4-5). He is negotiating to sell "Temptation" to NBC and if accepted it would air five days a week for at least 15 weeks. The Grade A and B contours of the NBC station in Los Angeles (KNBC)[27] would overlap with that of Channel Islands' proposed station (California Broadcasting Exhibit 2; Tr. 874-76).

Comparative Coverage

134. An issue on comparative coverage was originally specified which became moot when Channel Islands moved its antenna site from a location on one of the Channel Islands — Santa Cruz Island — about 20 miles off the California coast to the identical antenna site as proposed by California Broadcasting.

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[26] Ms. Reisman is included in this group only insofar as possible merit for female ownership (Tr. 552).

[27] Official notice is taken of the 1980 TV Factbook which shows KNBC is owned and operated by NBC.

Conclusions

1. At the outset, Channel Islands advances various arguments and explanations in the form of a confession and avoidance for the many failures charged to Channel Islands in this proceeding. Channel Islands first urges that Ralph Andrews did not report certain material because he did not understand the information to be "decisionally significant"[28] (Channel Islands Findings (Phase II, pp. 16, 34)). Channel Islands would thus excuse reporting the Rofeh deed of trust and the second Hurwitz, as a result of Andrews' misunderstanding of what must be reported to the Commission. While Andrews did take this position at the hearing, the evidence shows Channel Islands' lawyers advised the individual shareholders and Andrews was the 51% shareholder, not to rationalize what is or is not of "decisional significance". In fact, early on, the Presiding Judge gave notice that Andrews should not attempt to determine what is of "decisional significance". In early 1981, Channel Islands responded to a California Broadcasting Petition to Enlarge Issues which alleged that a cross-claim filed by Meredith Corporation against Andrews was "of very little significance"[29] Channel Islands also maintained the *West Credit* judgment was "not of any decisional significance in this proceeding". When the California Broadcasting Petition to Enlarge Issues was granted and a reporting issue added against Channel Islands by *Memorandum Opinion and Order* on May 1, 1981, the Presiding Judge stated:

> It is no excuse to state that the failure to report involved only insignificant items. Whether such items are insignificant [is] not for Channel Islands to decide.

2. Only about three weeks after the May 1, 1981 *MO&O* was issued, Andrews placed a $282,226 deed of trust on his primary asset in favor of Hurwitz. Yet, Andrews stated at the hearing that the matter was not "significant" to warrant reporting to the Commission (Tr. 2636-37). Similar testimony was provided by Andrews about the $120,000 deed of trust which he placed on the beach house and switched to the Oxnard Shores property about two months after the May 1, 1981 *Order*. Andrews also claimed the tax liens were insignificant (Tr. 2629). Thus, it must be concluded that in spite of advice from his counsel and a warning from the Presiding Judge, Andrews continued to take refuge in what he knew to be a self-serving and questionable interpretation of the Commission's Rules.

3. An applicant has "an affirmative obligation to inform the Commission of the facts [it] need[s] in order to [issue a] license". *RKO General,*

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[28] Section 1.65 of the Commission's Rules requires changes to be reported so as to supply correct and additional information in the application as may be appropriate; whenever there has been a "substantial change" as to any other matter which may be of "decisional significance".

[29] Opposition to California Broadcasting Petition to Enlarge Issues filed by Channel Islands on February 17, 1981.

Inc. v. *FCC,* 670 F.2d 215, 229 (D.C. Cir. 1981), *cert. denied.* 456 U.S. 927 (1982). The court held that the Commission is not expected to "play procedural games" with applicants. *Id.* at 229.

4. Andrews offered a similar explanation on the March 31, 1982 Installment Sale Agreement with Thomas Voiss. But, Andrews did execute a deed of trust, Voiss did not receive any *Meredith* proceeds two months later and Voiss was never called as a witness to support Andrews' testimony that the Agreement was of no force and effect.

5. Next, Channel Islands argues that Andrews did not report the foreclosure proceedings, the *Saquin* judgment or the Simon deed of trust on Oxnard Shores because of reliance on counsel. The evidence does not support Andrews' good faith reliance on counsel. One example will demonstrate this. Andrews must have been aware that his financial position was almost on a daily basis undergoing severe adverse changes, including bankruptcy. The bankruptcy of Andrews in his personal capacity and of his wholly-owned corporation — RAP — was not reported. The record shows elaborate efforts were made to avoid disclosure to the Commission. On Andrews' personal bankruptcy, Andrews had previously encouraged Stage to file for bankruptcy in his stead (Tr. 1974-77). Andrews knew that if he openly declared his financial problems to the Commission, he would face a greater risk of disqualification under the then-pending financial issue and this was admitted in the bankruptcy proceeding. The cases are legion that an applicant is responsible for the actions and omissions of its attorney. *RKO General, Inc.* v. *FCC,* 670 F.2d at 231; *WADECO, Inc.* v. *FCC,* 628 F.2d 122, 128 (D.C. Cir. 1980); *Lorain Community Broadcasting Co.,* 18 FCC 2d 686, 688 (1969); *aff'd sub nom. Allied Broadcasting, Inc.* v. *FCC,* 435 F.2d 68 (D.C. Cir. 1970); *Midwest Broadcasting Co.,* 70 FCC 2d 1489, 1492 (Rev. Bd. 1979) *rev. denied,* FCC 79-397 (released June 21, 1979) and *George E. Cameron, Jr. Communications,* FCC 83R-20, slip op. at 29 (Rev. Bd. March 23, 1983). Andrews himself admitted that responsibility (Tr. 2631).

6. Next, Andrews urges that he did report the *Saquin* judgment and the federal tax liens in his "Statement of Net Assets" but these items were "not properly identified". There is no way that a review of headings such as "taxes payable" or "Various Other Accounts Payable" without more would alert anyone that these items include tax liens and unpaid judgments. Here again the conclusion must be that Andrews was affirmatively attempting to conceal the liens and judgments from the Commission.[30] An applicant is required to provide complete information and the Commission is not required to infer significant additional information from the less than complete information received. See *Vogel-*

[30] It is observed that Channel Islands never established that the tax liens and judgments were included under the indicated headings.

Ellington Corp., 41 FCC 2d 1005, 1010 (Rev. Bd. 1973); *WADECO, Inc.* v. *FCC*, 628 F.2d at 128; and *Jimmie H. Howell*, 65 FCC 2d 516, 521 (Rev. Bd. 1977).

7. Channel Islands next contends that Andrews' good faith is evident in that certain items which were not reported to the Commission were included in the Statement of Affairs as filed with the Bankruptcy Court in December, 1981. The argument is that if Andrews wanted to conceal these matters, he would not have included any reference to them in the bankruptcy filing. The history of this bankruptcy proceeding has been considered *supra.* and will be dealt with again, but it is concluded that it shows just the opposite of what Channel Islands alleges. On the specific point here alleged, i.e., in reporting items to the Bankruptcy Court not reported to the FCC shows good faith and a lack of intent to conceal, the following conclusions are pertinent. Neither the bankruptcy Statement of Affairs nor the filings with the FCC disclosed the *Saquin* judgment although Silverman's draft schedule submitted to Andrews' bankruptcy counsel did specifically list the *Saquin* judgment. Further, while Title Insurance had discussions with Andrews about the *West Credit* judgment, had corresponded with his bankruptcy attorney and filed a claim with the Bankruptcy Court, the *West Credit* judgment was not listed in the Statement of Affairs as filed with the Bankruptcy Court.

8. The Andrews Statement of Affairs, as filed with the Bankruptcy Court did clear up some matters on Andrews' many financial affairs. For the first time, the Rofeh deed of trust was known. As was the increased liability due Hurwitz. It is also a valid presumption that if Andrews did not reveal these matters to the Bankruptcy Court, both Rofeh and Hurwitz would quickly make these matters known to the court. In truth, Andrews had little choice but to include them.

9. The last item of confession and avoidance is the fact that during this period, Andrews had open-heart surgery in 1977, was involved in a divorce proceeding, was involved in litigation and problems such that Andrews was fighting for his very existence (Channel Islands Findings (Phase II), pp. 5, 36). However, this excuse does not excuse false testimony. Andrews told the Bankruptcy Court that all creditors of RAP had been paid "100 cents on the dollar". Andrews said the statement was made "at a very emotional time when I was under great stress and where I was accused of being in court in bad faith ***" (Tr. 1606-12). The Andrews *West Credit* testimony about the judgment having been satisfied was explained that the 1981 period was devastating for him and he "just blocked the truth out in this ***" (Tr. 2642-46).

10. Similar explanations have been considered and rejected before by the Commission. See *Milton Broadcasting Co.*, 34 FCC 2d 1036 (1972);

and *Pass Word, Inc.*, 76 FCC 2d 465 (1980), *aff'd* 673 F.2d 1363 (D.C. Cir 1982).

11. So much for the excuses of Andrews in his failure to report his concealment of judgments and material financial changes is itself disqualifying. In *Belo Broadcasting Corporation*, 68 FCC 2d 1479 (1978), *aff'd sub nom. WADECO, Inc.* v. *FCC*, 628 F.2d 122 (D.C. Cir. 1980), the applicant was disqualified for failure to report that two of the withdrawing shareholders were released from their endorsements on a note. Here, Andrews failed to report judgments, tax liens and a deteriorating financial condition — even after reporting issues were specified. See also *George E. Cameron Jr. Communications*, 91 FCC 2d 879, 884 (Rev. Bd. 1982), *recon. denied* FCC 83R-20 (March 23, 1982).

12. In resolving this issue, "intent" is a matter to be considered. It is enough for the Commission to find that an applicant has evidenced "active indifference" to his responsibilities. *Walton Broadcasting, Inc.*, 83 FCC 2d 440, 441 (1980), *aff'd* No. 81-1027 (D.C. Cir. May 28, 1982). A "wanton gross and callous disregard for [the] truth is equivalent to an affirmative and deliberate intent". *RKO General, Inc.* v. *FCC*, 670 F.2d at 225; *Leflore Broadcasting Co.* v. *FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980).

13. Considering the nature of Andrews' excuses and the massive scale of the failure to report shown in this record, it must be concluded that they were intentional on the part of Andrews, which is chargeable to Channel Islands or made with such wanton disregard for the Commission's requirements as to be the equivalent of intent, likewise chargeable to Channel Islands.

14. Andrews gave inconsistent and conflicting testimony on this record which is in and of itself disqualifying for Channel Islands. A number of conflicts have been demonstrated in this record between Andrews' testimony and documents, between Andrews' testimony and that of other Channel Islands witnesses, and between Andrews' testimony and previous statements made by him under oath. The following are representative of Andrews' contradicted and evasive testimony:

> Andrews testified that he made no agreement with Rofeh concerning security for his purchase of the antique lamps other than the deeds of trust on the beach house and Oxnard Shores (Tr. 1535). A letter from Andrews to one of his lawyers, Irwin Osher, evidenced an agreement to secure his purchase from Rofeh also with a lien on the *Meredith* settlement (Tr. 2245-46; California Broadcasting Exhibit A-80).
>
> Andrews testified that he did not agree to pay Rofeh within any particular time (Tr. 1695). The note in connection with the deed of trust on the beach house shows payment due within six months (California Broadcasting Exhibit A-37). Robert Greenfield, Andrews' current bankruptcy lawyer, testified that payment to Rofeh was past due (Tr. 3118).
>
> Andrews testified that he had always considered Rush to be a 50-percent equity owner of Oxnard Shores and that he had always been open about their sharing of that ownership (Tr. 1471-72, 1477, 1479-80). Andrews swore under oath to the RAP

Bankruptcy Court, however, that the Oxnard Shores property was "owned by him personally * * * subject to * * * an option to acquire an undivided 50% interest in favor of Herman Rush." (California Broadcasting Exhibit A-66) Andrews' Statement of Net Assets submitted to the Commission in 1981 also stated only that Rush had an "option to purchase 50 percent of this property" (California Broadcasting Exhibit 8, pp. 2-4).

Andrews testified that the value shown for Oxnard Shores in the January, 1981 Statement of Net Assets treated him as a 50-percent owner with a 20-percent override in a property worth $5.6 million (Tr. 2010-11). He also testified that this had always been his understanding (Tr. 2112). Yet, Andrews testified less than two months before at his 1982 deposition that the value was based on his 100-percent ownership (California Broadcasting Exhibit A-64, p. 2). Silverman testified that he had had many discussions with Andrews about how the value for Oxnard Shores should be shown on the Statement and that Andrews had felt the property was worth $4 million (Tr. 3035-37).

Andrews testified to the Commission and the Bankruptcy Court that he had "nothing whatsoever" to do with removing built-in appliances and other items from the beach house just prior to its sale in foreclosure (Tr. 1995, 2853). Herrick Andrews testified at his deposition that Peter Andrews had participated in the removal of items from the house "on behalf of my father" and that Peter had said his father had asked him to remove items from the house (California Broadcasting Exhibit A-60, pp. 3-4). Ralph Andrews later acknowledged that he had asked Peter to remove certain items (Tr. 2638).

Andrews testified that he and Thomas Voiss had superceded the Installment Sale Agreement — in which Voiss and Andrews had agreed to substitute a $450,000 deed of trust on Oxnard Shores for Voiss' interest in the *Meredith* settlement — by an oral agreement (Tr. 2608-10). The Installment Sale Agreement says that it may be superceded only in writing (California Broadcasting Exhibit A-49, p. 3) and no document or corroborating testimony was introduced to support Andrews' story.

Andrews testified at his deposition in 1981 that Herman Rush was responsible for and made the 1981 annual mortgage payment on the Oxnard Shores property (California Broadcasting Exhibit A-76). Channel Islands later advised California Broadcasting that Andrews had made the payment, but that Rush had made a payment to Andrews in "like amount" (California Broadcasting Exhibit A-78, p. 2). Andrews' testified at the Phase II hearings that he had been wholly responsible for the payment and had made it, but that Rush had loaned him the money for it (Tr. 2622-24). Rush testified that, although he had made a loan to Andrews, it was not related to the Oxnard Shores property (Tr. 2918).

15. Commission precedents are uniform that false and evasive testimony is always disqualifying, whether or not the subject of any specific issue. *Rocket Radio, Inc.*, 66 FCC 2d 193, 197 n. 9 (Rev. Bd. 1977), *rev. denied*, 43 RR 2d 649 (1978). It is the fact of misrepresentation not merely the importance of the facts misrepresented that is crucial. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946); *Pass Word, Inc.*, 76 FCC 2d at 509; *Martin Lake Broadcasting Co.*, 34 FCC 2d 956 (Rev. Bd. 1972), *rev. denied*, FCC 73-275 (1973).

16. In addition to Andrews' false, evasive and contradicted testimony to the Commission, Andrews had also made misrepresentations in filings

to the Commission which, standing alone, would require disqualification, for example:

> Andrews advised the Commission that as of July, 1980 his "current liquid assets exceeded by $400,000 the total of all current liabilities" (California Broadcasting Exhibit A-32). He later testified that he had less than $50,000 in liquid assets at any time in 1980 (Tr. 1588-89).
>
> Andrews' January 31, 1981 Statement of Net Assets overstated his net worth by at least $1,725,000. He omitted liabilities owed to George Howarth and West Credit ($80,000). He understated his obligations in connection with the beach house ($145,000). He overstated his true interest in Oxnard Shores ($1,500,000).
>
> Andrews falsely and misleadingly advised the Commission by affidavit that the *West Credit* judgment had been "satisfied" (California Broadcasting Exhibit A-71, p. 7). Actually, the judgment had merely been assigned to Title Insurance Company.

17. The Commission had disqualified a number of applicants for misrepresentations made to the Commission. See *Leflore Broadcasting Company, Inc.*, 65 FCC 2d 557 (1977), *aff'd* 636 F.2d 454 (D.C. Cir. 1980); *Radio Carrollton*, 69 FCC 2d 1139 (1978), *recon. denied* 72 FCC 2d 264 (1979), *aff'd sub nom. Faulkner Radio, Inc.* v. *FCC*, No. 79-1749 (D.C. Cir. 1980), *cert denied.* 450 U. S. 1041 (1981); *Belo Broadcasting Corp., supra.*; *Sea Island Broadcasting Corporation of S. C.*, 60 FCC 2d 146 (1976), *aff'd* 627 F.2d 240 (D.C. Cir), *cert. denied* 449 U. S. 834 (1980) and *Country Broadcasting*, 93 FCC 2d 83 (Rev. Bd. 1983). All the above cited cases resulted in disqualification of the applicant. The *Fox River Broadcasting, Inc.* case, 53 RR 2d 44, 46 (1983) does not permit a lesser sanction. There, a demerit was assessed against the applicant whose principal had made a negligent misstatement at a deposition. Andrews has made numerous misrepresentations and has shown a lack of candor throughout this proceeding.

18. Channel Islands has not met its burden of proof on the candor issues. The Phase II proceeding relied almost exclusively on the inconsistent and contradicted testimony of Ralph Andrews and Channel Islands called only three witnesses. The testimony of Sidney Silverman, Andrews' accountant, was itself unworthy of belief in many areas as self-contradictory and evasive. For example, he contradicted his earlier affidavit submitted to the Commission and he attempted to manufacture evidence submitted to the Commission in support of Andrews, relative to inclusion of the *Saquin* judgment in the January, 1981 Andrews Statement of Net Assets. Robert Greenfield, Andrews' bankruptcy lawyer and Herman Rush, Andrews' long-time friend and business associate, testified only in limited areas. Even then, Mr. Greenfield contradicted Andrews' testimony that a plan had been prepared in his bankruptcy proceeding. Compare Tr. 1677 with Tr. 3101. Mr. Rush contradicted Andrews' testimony about the purpose of a $25,000 loan in 1981. Compare Tr. 2622-

24 with Tr. 2918. Many areas of Andrews' explanations went entirely without support or corroboration.

19. The Review Board has considered the failure to present a witness with knowledge of the facts in *WNST Radio*, 70 FCC 2d 1036, 1041 (1978). There, the Board deals with the question of the existence of an available potential witness whose information is relevant and not cumulative to the issue. The failure to produce the witness gives rise to an inference that the witness' testimony would not have been favorable. Andrews' uncorroborated testimony on the basis of this record cannot be accepted. The persons who would be able to lend support to the Andrews version are well-known to Andrews and there is repeated reference in the record to their existence and knowledge of the facts. For example, Mansour Rofeh, Kelly Stage, Herrick Andrews, Peter Andrews, William Simon, Irv Gross, John Read, Thomas Voiss were each in a position to support Andrews' version of the facts. Based on the *WNST* case, *supra.*, this does lead to the inference that these persons, if called, would have provided testimony unfavorable to Andrews. Here, Andrews' self-serving testimony cannot be accepted. In *Lewel Broadcasting, Inc.*, 86 FCC 2d at 912, the Commission rejected an applicant's contention that "there had been no deliberate scheme to conceal a wrongful act and that any misstatements were inadvertent" on the grounds that the self-serving testimony was "inherently unbelievable". Because of the self-contradictory and evasive nature of Andrews' testimony, the need for support and corroboration is especially great in this case. See *WWLE, Incorporated*, 85 FCC 2d at 86.

Financial Irresponsibility and Bad Faith

20. Channel Islands suggests that Mr. Andrews' financial problems are the product of bad luck—based upon unrelated events stemming from the failure of one of RAP's shows in the mid-1970s. This issue cannot be resolved by assertions of bad luck. Here, the record shows a recalcitrance on the part of Mr. Andrews in paying his debts such that Channel Islands cannot be awarded a license in the public interest. A party who has consistently placed the requirements of his creditors behind new schemes for personal profit, who has required creditors to sue to obtain payment and who has refused to pay resulting judgments and governmental obligations cannot be awarded a broadcast license. See *Arizona Mobile Telephone Company*, 66 FCC 2d 691, 703 (1977).

21. This case demonstrates a pattern, on the part of Andrews, of delaying payment to creditors and forcing them into court. When RAP became financially strapped, he caused that company to pay his personal debts. He absented himself from RAP at a critical period of time to pursue the *Meredith* litigation and the development of Oxnard Shores. He placed RAP in Chapter XI, where he could continue to use that company as a vehicle to develop programs while he refused to pay RAP's creditors for

six years. He refused to pay judgments ordered by the state courts because of "other priorities" which were personal investments in real estate and expensive antiques. He delayed payment of federal taxes and even refused to pay them after they were reduced to liens. The government was ultimately forced to attach his bank account in an effort to collect (Tr. 1791). Andrews argues that he simply took advantage of his legal right to use the judicial system. The evidence shows, not a man beset by unfortunate circumstances, but a man refusing to pay amounts he did not want to pay. Andrews claims he was placed in personal Chapter XI bankruptcy because his loans to RAP put a strain on his finances. However, Andrews purchased his interest in the beach house after RAP filed for bankruptcy and he missed the crucial payment due on the beach house on the same day he invested in the Costa Rica gold mine. Rather than Andrews' loans to RAP, his personal Chapter XI resulted from the purchase of the beach house, the Oxnard Shores property, the gold mine and the antiques.

22. Andrews' efforts to avoid filing his own personal Chapter XI bankruptcy is directly related to this proceeding. Andrews first sought to avoid any knowledge by this Commission of his rapidly deteriorating financial condition. Thus, he encouraged Mr. Kelly Stage, the only co-owner of the beach house not connected with Channel Islands, to file what the court found to be "strawman" proceedings. Despite Andrews' indication that he was willing to sell his art and antique collection to make his required payments to Channel Islands (Tr. 1598), he did not sell any significant items to avoid bankruptcy. And he traded an historical document worth $100,000 for a larger share in the gold mine, but refused to sell this document to make the beach house payment (Tr. 1690).

23. Channel Islands urges that the bad faith findings of the Bankruptcy Court have now been found moot by that court. While such findings may now be moot in the context of the bankruptcy proceedings, i.e., the beach house has been sold to satisfy the judgment of the Yaffes, the history of Andrews' attempt to conceal, through the Kelly Stage straw man proceeding, Andrews' true financial condition to this Commission is very relevant to this proceeding especially when a financial issue has been added against Channel Islands and Andrews' then bankruptcy counsel recognized before the Bankruptcy Court that Andrews' Chapter XI proceeding would not be in the best interest of Channel Islands in the FCC proceedings. What Andrews has done is to use the Federal and State Courts of California to avoid timely disclosure of Andrews' severe financial reversals to the FCC and this is bad faith.

24. Andrews' actions in supporting the multiple Stage bankruptcy filings are found to be part of a continuing scheme by Andrews to hide his true financial posture from the Commission. Andrews knew that once he

filed for Chapter XI relief, this would have to be reported to the Commission (Tr. 1975) and that during the several Stage bankruptcy proceedings, Andrews was "desperately trying to buy time" to straighten out his financial problems (Tr. 1977). Andrews' involvement in the Stage "straw man" proceeding constituted an abuse of the FCC's requirements, i.e., that Channel Islands keep this agency advised of the adverse change in financial qualifications of its major stockholder—Andrews.

25. This is not a case where some minor blemish is examined in an applicant's financial history. Andrews has shown a history of failing to pay judgments and tax liens, subornated his creditors to his efforts for profit and a willingness to place his own investments above that of the public interest. By orchestrating, aiding and abetting Stage's straw man bankruptcies, he has shown contempt for the processes of this Commission and such financial irresponsibility and bad faith are found to be disqualifying.

Financial Qualification

26. Channel Islands would propose as a conclusion that:

> The Channel Islands financial proposal is now based upon a letter from the First Interstate Bank of California (Channel Islands Exhibit 32). Construction and operating costs are estimated at slightly in excess of $1,500,000. The letter from the First Interstate Bank will provide Channel Islands with net proceeds in excess of $2,000,000. All requirements set forth in the Bank letter as conditions for the commitment letter have been satisfied.[31]

While such a conclusion may, on the surface, seem correct, it is little more than a Hollywood stage setting facade and the behind-the-scenes props are crumbling. The updated November 24, 1982 letter from the First Interstate Bank (Channel Islands Exhibit 32, pp. 7-9) was not based on accurate information. The bank had been informed by Dr. Arthur Schechter that Channel Islands' subscribers' financial status had not changed since 1981. One of the reasons for adding the financial issue was that the true financial condition of the 20 original subscribers to Channel Islands' stock had not been established when this case was designated for hearing and they remain not established. Because the original bank letter was based upon representations by Channel Islands which were not factual, the financial issue was added against Channel Islands.

27. The present bank letter as introduced in Phase II of this proceeding is the First Interstate Bank letter of November 24, 1982 and Channel Islands has abandoned reliance upon the first equipment credit letter from the Harris Corporation. The First Interstate Bank letter is conditioned upon a pledge by each of the applicant's shareholders of his or her stock and a pro rata guarantee by each stockholder of his or her pro

[31] Page 29 of Channel Islands' Supplemental Proposed Findings of Fact and Conclusions of Law.

rata share of the loan. As for Andrews, the bank would accept him as guarantee if he pledged, in addition, lien payments due on the *Meredith* settlement ($1,023,371) and his interest in the Oxnard Shores property. In deciding whether the bank will make a loan, the bank does review the potential guarantor's financial statement and Mr. Hodgins, an officer of the bank, who appeared as a witness in this proceeding stated he had received Andrews' 1981 and 1982 financial statements. The Andrews 1981 financial statement misrepresents Andrews' financial situation as of January, 1981 and the Andrews 1982 financial statement contains numerous mistakes and omissions. For example:

> The value shown for the Oxnard Shores property is based on an appraisal which assumes the property will be subdivided into 14 lots. The Coastal Commission had only approved 10 lots as of November, 1982 and this fact reduced the value of the property by $1.6 million.
>
> In April, 1982, Thomas Voiss recorded a deed of trust secured by the property in the amount of $450,000. This lien was not reflected in the financial statement.
>
> Pursuant to his marital settlement agreement, Andrews is obligated to transfer to his former wife $810,000 from the *Meredith* settlement proceeds, a $200,000 deed of trust secured by the property, a ten percent interest in RAP and one-seventh of his interest in Minera d'Oro. Only the transfer of the *Meredith* proceeds, shown on the liability side of the statement is reflected therein.
>
> Andrews promised to give a 10 percent interest in RAP to Thomas Voiss, an event not reflected in the statement.

28. Further doubt is placed upon Andrews' 1982 financial statement in view of the fact that the bank was unwilling to loan Andrews $800,000 in his individual capacity (Tr. 1546-51). Further, on March 28, 1983, Andrews submitted an application to the Bankruptcy Court for emergency *ex parte* relief to secure a loan made by William Simon—Channel Islands' California counsel—to Andrews in the amount of $84,264.11. The application was made so that Andrews could pay a debt in that amount to Channel Islands. No other entity, according to the application to the Bankruptcy Court, agreed to loan Andrews these funds.[32]

29. In addition, Mr. Greenfield has testified that Andrews' unsecured creditors will be paid with proceeds from the *Meredith* settlement. The record fails to show that the bank is aware of these matters. Clearly, the two additional assets, the bank required Andrews to pledge—the *Meredith* settlement and the Oxnard Shores property—have significant encumbrances which the bank was not aware of in November, 1982.

30. Next, the bank indicated an acceptable alternative, i.e., a willingness to rely on Mr. Rosebrugh's guarantee instead, although the bank continued to believe Andrews' assets alone would be sufficient. Mr. Rosebrugh's willingness to make the guarantee to the bank is not

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[32] Official notice is taken of the request for an *ex parte* order filed with Judge Ashland on March 28, 1983 in Case No. 81-13106-CA.

challenged on the basis of his financial ability to make such a guarantee. It appears, however, that Mr. Rosebrugh is relying on Mr. Andrews' 1982 financial statement, which is the same one provided to the bank that has been found deficient in many respects. What Mr. Rosebrugh's position would be on the guarantee if he had the full details on Andrews' financial position are unknown. A further question is presented with respect to Rosebrugh's testimony. Rosebrugh is only a 5% stockholder with contributions of less than $30,000 to Channel Islands. It is questionable whether Mr. Rosebrugh, who gave every indication of being a reasonable and astute businessman, would guarantee Mr. Andrews 51% pro rata share of the loan much less the entire $2 million loan with such a small ownership interest, or other effective control over Channel Islands. Mr. Rosebrugh did testify at the hearing to obtaining another 1% of the Channel Islands stock. Based on the inaccurate information received by Mr. Rosebrugh on Mr. Andrews' financial situation, the 5% or 6% stock ownership interest of Mr. Rosebrugh in Channel Islands, and the lack of any terms, as shown in this record, which would serve to protect Mr. Rosebrugh's up to $2 million guarantee to the bank, Mr. Rosebrugh's offer to guarantee such a bank loan cannot be accepted.

31. The bank letter is also conditioned on the pledge of each shareholders' stock. As of the date the record was closed, Ben Nordman had not indicated a willingness to pledge his stock for the purpose of obtaining the bank loan.

32. It appears the bank has taken no steps to determine whether to make the $2 million loan to Channel Islands since as yet the bank has received no information on construction costs, equipment financing, expected revenues and shareholder assets and liabilities. Further, Mr. Hodgins testified that the bank has never made a loan of $2 million to a new corporation where majority shareholder—Andrews 51%—was in Chapter XI reorganization. Based on the record, it cannot be concluded that the bank has a present firm intention of making the loan.

33. The second Harris Corporation letter under consideration in Phase II is dated November 24, 1982 and replaces the one originally considered in the Phase I proceeding dated August 12, 1981. Mr. T. R. O'Hara, the District Manager, Television RF Sales, signed the letter for the Harris Corporation and he was a witness in this proceeding. The revised Harris letter was requested by Channel Islands' California counsel—Mr. Simon—and no new or updated financial information was submitted by Channel Islands to Harris. Some updated Channel Islands financial information was submitted to Harris after the revised letter was sent. Whether this information was ever reviewed is unknown. If it was reviewed, it consisted of the 1982 Andrews Statement of Net Worth, which as previously concluded, fails to provide substantial adverse details about

Mr. Andrews' financial qualifications. Further, the second Harris letter does not bind Harris to make credit available to Channel Islands.

34. Channel Islands has had several opportunities to amend its financial proposal, and it took advantage of the Presiding Judge's ruling which permitted it at the start of Phase II of the proceeding to again address its financial qualifications and it has failed to demonstrate that it is financially qualified to become a Commission licensee. Even granting that the bank and equipment supplier letters appear to provide reasonable assurance that sufficient funds are available for the sake of argument, the information from Channel Islands which was available to the bank and equipment supplier was neither accurate nor truthful and a valid presumption can be made that a reasonably prudent bank and equipment supplier would provide several million dollars in credit and equipment once the true facts were known. The same presumption can be made for Mr. Rosebrugh who gave every indication as a witness of being a long-time highly successful and competent businessman who also had received the same inaccurate and untruthful information about Mr. Andrews' true financial condition. It is inconceivable that a businessman of Mr. Rosebrugh's standing would enter into such a guarantee arrangement with Channel Islands given the untruthful information he has received and having only a 5% or 6% ownership interest in Channel Islands. The financial issue is resolved unfavorably to Channel Islands.

The Comparative Issue

Integration

35. California Broadcasting proposes to integrate its 100% owner—Mr. Keiffer—into a full-time supervisory position at the station. While Mr. Keiffer's role is not specifically shown, Mr. Keiffer has stated he will make the "ultimate decisions" and he proposes to also have a full-time manager at the station. Mr. Keiffer also proposes to remain as the owner of A & K Developments but he has represented that since he also controls A & K, he will be able to ensure that he can keep his full-time commitment to California Broadcasting.

36. California Broadcasting seeks to enhance its integration credit by Mr. Keiffer's claim of local residency within the proposed service area. However, the record also shows that for the past three years, Mr. Keiffer has lived in Lancaster, California, which is outside the proposed service area. Because of business reasons—his A & K construction business—it was necessary for Keiffer to move to Lancaster, but he intends to return to Ventura County when the Lancaster project is completed. While it appears that during the three years absence from Ventura County, he has maintained some contact with the area, he actually lived and maintained a residence in Lancaster, to be near his business. The record does, however,

permit a conclusion, that with the completion of the Lancaster project, Mr. Keiffer will return to Ventura County.

37. Prior to Mr. Keiffer's departure from Ventura County three years ago, he was involved in the area's civic activities. For example, he had been the Treasurer of the City of Ventura for four years, had run for a seat on the school board and a number of other activities, but none of this is after 1973. Mr. Keiffer has no past broadcast experience.

38. In summary, California Broadcasting will be credited with 100% integration and California Broadcasting is entitled to only a moderate enhancement of its integration proposals for Mr. Keiffer's long-time residency in the service area prior to his departure three years ago and his previous civic activities there. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Such enhancement is no more than moderate in view of Mr. Keiffer's three-year absence from the Ventura area, and to this extent, he has been out of touch with the community and his civic activities took place no later than 1973, so this approaches a remoteness in time as to how well such past knowledge can assist him now.

39. Channel Islands proposes to integrate several of its shareholders, Ralph Andrews, a 50.1% shareholder is proposed to be the full-time General Manager at the station. Herrick Andrews, a 3% shareholder will be the full-time Program Director, Jeffrey Steinhardt, a 1% shareholder will be the full-time Public Affairs and Community Services Manager. Bruce Paranay, a 19% subscriber will be the full-time Operations Manager.

40. Bruce Paranay has not proposed to move to Ventura County. Ralph Andrews and Jeffrey Steinhardt do propose to move to Ventura County. Herrick Andrews proposes to move to the City of Ventura. In addition, Mr. Ralph Andrews claims that he lived in the City of Ventura in 1977 and he owned a beach house in Oxnard, Ventura County from 1975 until 1978.[33] The record will not support this claimed previous residence of Mr. Andrews in Ventura or Ventura County. During this period of claimed residence, he worked in Tobuca Lake and owned another residence which he considered a legal residence. At best, his residence in Ventura was restricted to evenings or week-ends.

41. Channel Islands' integration proposal is entitled to no enhancement for civic participation. Mr. Andrews' sole claim to civic participation in the Ventura area is his membership in the Oxnard Shores Community Association. However, such membership is automatic upon the purchase

[33] This is the same beach house which Mr. Andrews *et al* purchased from Dr. and Mrs. Yaffe. Mr. Andrews was the original owner of this house. He sold it to Dr. and Mrs. Yaffe and the house was sole by the Yaffes to Andrews *et al* after it had been substantially destroyed by fire.

of property in Oxnard Shores, and, it is not clear what civic activities are conducted by this property association and Mr. Andrews could not explain what its activities are.

42. Ralph and Herrick Andrews have some past broadcast experience. Each has worked at a broadcast station, though not at a management level in the recent past. Mr. Ralph Andrews also has experience in the TV program production (RAP) and this background may be included in past broadcast experience. To an extent, Mr. Ralph Andrews' activities at RAP could present a conflict of interest since he produces syndicated TV programs through RAP and as the officer and manager of Channel Islands, he will be a purchaser of TV programming for the proposed TV station.

43. However, the qualitative value of Ralph Andrews' integration is eroded by his Phase II testimony. He no longer has a residence in Ventura County to which he can move if the Channel Islands application is granted. Thus, any claimed enhancement for a commitment to move to the area is gone.

44. In addition, Mr. Andrews has testified at length as to his willingness to absent himself from his business to pursue personal investment opportunities. For example, Mr. Andrews himself believes RAP had to be placed in a Chapter XI proceeding because he was spending far too much time on the Oxnard Shores property venture on the many hearings to increase the total lots from 10 to 14. When this is coupled with Mr. Andrews' other deficiencies as shown in this record, such as a history of bankruptcy, his failure to report information to the Commission and his less than candid testimony at the hearing, the integration credit may be "markedly lessened", where the indications are that he may not be willing to bring to the licensee the kind of public-spirited leadership that would serve the public interest. As the Review Board has noted, "[t]here is little point in according a substantial affirmative credit for integration to one whose past deficiencies undercut the prospects of public benefit from future full-time participation". *Town and Country Radio Inc.*, 65 FCC 2d 694 (Rev. Bd. 1977). The record in this proceeding has shown that Ralph Andrews has shown none of the qualities the Commission looks for in a full-time operator of a broadcast station. In conclusion, the integration credit which would otherwise be afforded to Ralph Andrews, is graded down to at best slight. *Peoples Broadcasting Corporation*, 52 RR 2d 1617, 1635 (Rev. Bd. 1983), *recon. denied*, FCC 83R-33, released May 3, 1983.

45. Certain changes have occurred during this proceeding which have changed in a minor way the ownership structure of Channel Islands. The following table reflects these changes:

	Previously Claimed	*Claimed at Present*
	Full-Time Integration	
Ralph Andrews	50.1%	50.1%
Herrick Andrews	3%	2.5%
Jeffrey Steinhardt	2%	2.5%
Bruce Paranay	1.9%	1.58%
	Part-Time Integration (less than 20 hours)	
Manuel Escalante	5%	4.5%
Angela Escalante	5%	4.5%
K. Victor Kato	3%	2%
Lori Reisman	2%	1.66%

46. These changes reduce the Channel Islands claim for full-time integration from 57% to 56.18%. Channel Islands' claim for "part time" actually two to five hours per week is reduced from 15% to 12.66%. Channel Islands' claim for "part time" integration is not sustainable since each person in this category proposes to work less than 20 hours per week.[34] *Mid-west Broadcasting Company*, 70 FCC 2d 1489, 1494-95 (Rev. Bd.), *rev. denied* FCC 79-397 (1979)

47. The next matter to be considered is the extent to which the 12.66% owners, while not entitled to any credit for part-time integration, i.e., less than 20 hours per week, are nevertheless entitled to some credit since this group is made up of women and ethnic groups[35] entitled to some merit consideration. The status of female ownership, standing alone, is a basis for comparative recognition. As pointed out by the Review Board in *Horne Industries, Inc.*, 54 RR 2d 249, 255-59 (Rev. Bd. 1983) the status of women has been in a state of flux until recently. It now appears clear that the Commission is committed to fostering greater participation by minorities and women in broadcasting. However, upon awarding an equal merit to Channel Islands for both its women and minority owners, the total ownership of this group as a whole in Channel Islands is 12.66%. Even increasing this percentage to largest ever shown in this record for Channel Islands for minorities, i.e., 15%, this falls far short of an interest level to ensure substantial likelihood that diversity of viewpoints will be increased. The *Horne Industries* case, *supra.* considers the case history of awarding a significant qualitative merit for integrated minority ownership and it sets such level at more than 50% or controlling, 54 RR 2d at 258, although recognition can be given to minorities, including women

[34] Manual F. Escalante—5 hours per week; Angela Escalante—5 hours per week; K. Victor Kato—2 hours per week and Lori Reisman—2 hours per week.

[35] Persons of Hispanic and Japanese background are represented in this group.

where a lower level of integrated minority ownership may be decisional in otherwise deadlocked cases.

48. This case, on a comparative basis, is not a close case. California Broadcasting has 100% integration credit with moderate enhancement for local residence and civic participation. Channel Islands' 50.1% integrated owner, Ralph Andrews, will both on a *de facto* and *de fure* basis control and manage the daily and overall operation of Channel Islands, the quality of such integration is severely offset by Ralph Andrews' misconduct, as established in this record. Given Ralph Andrews' dominant role in the proposed operation, the other proposed full-time integrated owners, who collectively will hold less than 7% of the stock and the minorities (ethnic and women) and will work 2-5 hours per week and hold less than 15% of the stock in total would not be entitled in any event to more than a slight residual credit, which would be decisionally insignificant in this case.

Final Comparative Evaluation

49. California Broadcasting is the preferred applicant since it will provide 100% integration with some moderate enhancement for local residence and civic participation. Channel Islands rates a substantial demerit for the lack of character qualification for its prime principal, Ralph Andrews. Further, while neither application has other media interests as such, it is a factor in diversification that Ralph Andrews continues to operate RAP, Inc. under the Chapter XI proceeding. RAP both produces and syndicates TV program material which raises an element of conflict, particularly when Ralph Andrews in his Channel Islands capacity is seeking to purchase programming for the proposed new UHF TV station. Thus, on diversification, California Broadcasting would again be the preferred applicant over Channel Islands.

Ultimate Conclusion

50. California Broadcasting has been found qualified to be a licensee of a new UHF TV station at Ventura, California. Channel Islands has been found disqualified on each of the basic qualifying issues as specified against it, including the financial issue, and further, on the comparative issue, California Broadcasting is likewise the preferred applicant.

51. Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with Section 1.276 of the Rules,[36] the application of Channel Islands IS DENIED and the applica-

[36] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken

tion of California Broadcasting for a new UHF TV station at Ventura, California IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

BYRON E. HARRISON, *Administrative Law Judge*

any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to Paragraph (c) of Rule 1.276.

Construction Permit, Modification of
Petition to Deny
Satellite Direct Broadcast

Applications for modification of CP to establish an interim direct b/c satellite system granted, provided permittee demonstrates due diligence in construction of its satellite. Petitions and objections to modifications granted in part and denied in part.
—*CBS, Inc.*

FCC 84-275

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In re Applications of	
CBS, INC.; and	File No. DBS-81-02-MP
Dominion Video Satellite, Inc.	File No. DBS-81-08-MP
For Modification of Construction Permit to Establish an Interim Direct Broadcast Satellite System.	

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1984; Released: June 18, 1984

BY THE COMMISSION:

1. The Commission has before it for consideration: (1) the above-captioned applications of CBS, Inc. ("CBS") and of Dominion Video Satellite, Inc. ("DomVid"; formerly Video Satellite Systems, Inc.); (2) a petition to deny those applications filed by Direct Broadcast Satellite Corporation ("DBSC"); (3) objections to CBS's application filed by Hughes Communications Galaxy, Inc. ("Hughes") and United States Satellite Broadcasting Company, Inc. ("USSB"); and (4) related pleadings and correspondence.[1]

[1] All parties have filed opposition and reply pleadings, including motions for extension of time for their respective pleadings. Those motions are hereby granted. DomVid's

2. USSB and DBSC claim that CBS's modification application constitutes a major change in its original Interim DBS application (DBS 81-02), and that a grant of CBS's application would have various anticompetitive effects if a joint venture, now under consideration, is entered into with Satellite Television Corporation ("STC").[2] USSB and Hughes contend that CBS's claim that it has demonstrated "due diligence" by completing contracting for the construction of its satellite, warranting the assignment of orbital positions and channels, is insufficient. DBSC asserts that DomVid's modification application constitutes a major change in its original Interim DBS application (DBS 81-08), violates the Commission's cut-off procedures, and is unfair to other permittees.

3. CBS and DomVid filed their original Direct Broadcast Satellite ("DBS") applications in response to the Commission's announcement of a cut-off period for DBS applications to be considered in conjunction with the accepted DBS application of STC. *Notice of Proposed Policy Statement and Rule Making* in General Docket No. 80-603, 86 FCC 2d 719 (1981). Those applications were granted, conditioned, in part, on the outcome of the 1983 Region 2 Administrative Radio Conference ("RARC-83"), the permittees' conformance to the Final Acts of RARC-83, and their "due diligence" in the construction of their proposed systems. *In re CBS, Inc.*, 92 FCC 2d 64 (1982).[3] After the conclusion of RARC-83 and the issuance of its Final Acts, the Commission set a time period, until January 5, 1984, for all permittees to modify their previously granted applications to specify performance within the parameters of the Final Acts and to request specific channel and orbital assignments from among those assigned to the United States by RARC-83. *In re Processing Procedures Regarding DBS Service* ("DBS Processing Procedures"), 95 FCC 2d 250 (1983).[4] It is these modification applications by CBS and DomVid, in response to that Order, which petitioners oppose.

Dominion Video Satellite, Inc.

4. DomVid originally proposed to provide DBS service to the entire United States, including Hawaii, Alaska, Puerto Rico, and the Virgin Islands from four satellites with each satellite providing two signals into a quarter of the Continental United States ("quarter-CONUS"). It also

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modification application includes a further February 28, 1984 amendment, against which DBSC filed another petition to deny. These submissions are also considered herein.

[2] STC, another DBS permittee, has already been granted a construction permit and assigned channels and orbital position. *In re STC*, FCC 84-208, released May 16, 1984.

[3] All applicants were required to demonstrate "due diligence" in pursuing their approved systems by beginning construction or completing contracting for construction of their satellites within one year of the grant. 47 C.F.R. §100.19; *In re CBS, Inc., supra* at 108.

[4] This Order also extended the time, until July 17, 1984, by which permittees were required to comply with the due diligence requirement of their construction permits.

proposed one low-power channel per satellite for inter-studio video relay. The Commission denied the request for the low-power channel, finding such use of a DBS channel inappropriate, but approved the other aspects of the proposal, and granted DomVid a construction permit for the first phase of its system, consisting of two satellites which would provide nationwide, one-channel service. *In re CBS, Inc., supra.*[5]

5. DomVid's timely filed modification application requests the assignment of six channels to each of two satellites (located at 119°W and 148°W), with each satellite serving two time zones with three channels per time zone. It also requests authorization for subsequent satellites at 61.5°W and 175°W to serve the Eastern and Pacific time zones, respectively, with six channels each, permitting the satellites at 119°W and 148°W to then reorient their service beams so that each satellite provides six channels of service to the Central and Mountain time zones, respectively. DomVid has since filed an amendment to this proposal, on February 28, 1984, in which it requests the assignment of two additional channels to each satellite, and proposes to serve half-CONUS with each transponder in its first phase of operation. It also requests that its satellite for western half-CONUS service, originally intended for 148°W, be assigned to 119°W. Thus, DomVid now requests authority to operate its initial two satellites with each providing eight channels of half-CONUS service, from a single orbital position (119°W). Its second phase of operation would have four eight-channel satellites (61.5°W, 119°W, 119°W and 175°W) each serving quarter-CONUS. DomVid has not made a specific proposal for its tracking, telemetry, and command functions ("TT&C"), and has not made application for an earth station or uplink facilities to supply its programming signal to its satellites.

6. DBSC has filed a petition to deny DomVid's modification application,[6] and another petition to deny DomVid's February 28 amendment. In its initial petition, DBSC first notes that when the Commission granted DomVid's construction permit, it approved only two channels for each of four satellites to be used by DomVid, for a total of eight channels. It argues that because DomVid's modification application requests six channels for each of four satellites, for a total of twenty-four channels, it represents a tripling of orbit/spectrum resources authorized and, therefore, constitutes a major change in facilities. DBSC further argues that DomVid's modified proposal represents an inefficient use of the spectrum,

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[5] DomVid had also filed an amendment to its original application after the effective cut-off date. The Commission rejected the amendment to the extent that it requested additional transponders and/or satellites. *In re CBS, Inc., supra* at n. 31.

[6] DBSC's first petition also objects to the modification applications of STC (DBS-81-01-MP) and CBS. That petition was considered as it relates to STC's application in *In re STC, supra*; CBS's application is considered in this Order.

as its original service proposal could be accomplished by using two satellites with three channels each.[7] In its second petition, DBSC responds to DomVid's amendment of its modification application by arguing that it is inconsistent with the Commission's cut-off procedures and that its grant would allow DomVid an unfair priority in the assignment of additional spectrum.

7. In *DBS Processing Procedures, supra*, the Commission stated that "any request for modification involving additional use of the orbit-spectrum *may* constitute a significant change warranting the filing of a separate application for a major change in facilities." *Id.* at 252 (emphasis added). In so stating, the Commission specifically reserved its discretion to consider individual circumstances and cases as they arise. While a request for additional spectrum might be considered a major amendment under different circumstances, such a determination is not required here. The first phase of DomVid's initial modified proposal (for its first two satellites) represents an increase in resource demand of only four channels total, *i.e.*, from eight channels (four satellites with two channels each) to twelve channels (two satellites with six channels each). This is not a significant change from its original application, particularly where it merely brings this permittee into line with several of the other more modest proposals submitted after RARC-83.[8] The Commission recognizes the rapid evolution in this fledgling industry, as well as the need for operators to develop and maintain competitive systems. In granting the original applications, it did not intend to lock in permittees to their first stage proposals at that early phase of the developmental process. At that time, the Commission was making only preliminary judgments on embryonic system proposals, in anticipation of establishing its negotiating position at RARC-83. It would be inappropriate to now prohibit a permittee in this service from making necessary and prudent changes in a proposal filed during that initial stage of development three years ago, when those changes are submitted during the only time period established by the Commission for filing modifications.[9] Also, this change provides a

[7] DBSC also argues that it is entitled to a comparative hearing for the assignment to DomVid of any channels at any orbital location that DBSC has requested. That issue has been resolved against DBSC in *In re STC, supra* at ¶6.

[8] STC, CBS, and United States Satellite Broadcasting Company, Inc. each request a total of twelve channels to provide nationwide six-channel service in their modification applications. DBSC requests a total of twenty channels to implement its proposed system. Of the first-round applicants, only Graphic Scanning Corp. requests fewer than twelve total channels.

[9] Another amendment requesting additional channels by DomVid, submitted during an earlier procedural stage, was denied by the Commission. *In re CBS, supra* at n. 31. That amendment, however, was outside any time period prescribed for modifications. Furthermore, it was submitted prior to the RARC-83 determinations and the Commission's subsequent establishment of new application modification procedures. Prior to RARC-83,

significant enhancement of the opportunity for this permittee to provide a greater degree of diversity of programming. Finally, the viability of the first DBS systems is critical to the success of the service, and this change will contribute to, and may well be essential to, that viability.

8. DomVid's request, in its modification application, for a second phase, composed of twelve additional channels to be divided between 61.5°W and 175°W, cannot be considered in the same light. A change from eight to twenty-four total channels would be difficult to characterize as "minor" under any circumstances, and cannot be so characterized here. In DomVid's instant scheme of providing full national service from its first two satellites, these additional authorizations represent a further doubling of the initial resource usage (which already exceeds that initially proposed). DomVid has made no compelling showing to justify a grant of such a large increase at this stage of the proceedings. Given DomVid's recently stated intention (see below) of providing half-CONUS service with each transponder in its first phase of operation, the change would merely provide a refinement that is not essential to that service, and would represent no additional service to the public. Request for such additional facilities is made appropriately by a separate application.

9. DomVid's request of February 28 for two additional channels for each satellite must also be denied. This request is clearly outside the procedural guidelines established for processing DBS applications. While the Commission considers it imperative to maintain a certain flexibility in managing the development of this service, as explained above, some order in the application process is necessary for any such successful development. The Commission has previously stated, specifically with regard to the development of DBS service, that well established procedural rules intended to promote fairness and efficient processing, will not be ignored. *In re Advance, Inc., supra* at 108, 109. In this case, a specific factor that must be considered is the rights of the other first- and second-round applicants. Second-round applications were required to be filed (or modified) after the deadline for the first-round permittees' modification applications, and have been premised on certain expectations based on those modification applications. DomVid's latest amendment was filed after the second-round proposals were submitted. It would also be unfair to other first-round applicants which made their requests in a timely manner, to permit one of them to gain any possible competitive advantage

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the imposition of stringent modification restrictions was appropriate. The Commission could thereby minimize the risk that the eventual allotment to the U.S. at RARC-83 would be exceeded by the demands of first-round applicants and possibly necessitate comparative hearings. *Cf. In re Advance, Inc.*, 88 FCC 2d 100, 108-109 (1981). Because those concerns no longer exist, our new processing guidelines appropriately use a more flexible approach in determining whether an amendment should be deemed a major modification.

by a Commission action which grants an untimely request for additional use of the orbit/spectrum resource.

10. DomVid's proposal in its last amendment to change to half-CONUS service from each transponder (in its proposed first phase) represents only a beneficial technical change without increasing orbit/spectrum usage, and does not affect the rights of any other permittees or applicants in their bids for channels and orbital positions.[10] DomVid's proposal to locate both of its satellites at 119°W, rather than at 119°W and 148°W represents no additional use of spectrum resource and does not affect the grantability of any other applicant's request.[11]

11. Accordingly, DomVid can be approved for the requested number of channels, six per satellite, for two satellites to be positioned at 119°W, to provide six channel eastern and six channels western half-CONUS service, provided those facilities are available at the time DomVid completes its due diligence demonstration. (See paras. 15, 16, *infra.*) Preliminary analysis indicates that western service from 119°W at the power level specified by DomVid will not impose constraints on the Region 2 Plan adopted at RARC-83. However, the computer model used by the International Frequency Registration Board and by the Commission staff, upon which our analysis is based, is currently undergoing some minor modifications, and DomVid will be subject to any limitation on its operation which may appear necessary after a final analysis can be completed.[12] If DomVid prefers not to confront this uncertainty, it will be permitted to opt for a position at 148°W for its western service satellite by so notifying the Commission of its decision at the time it demonstrates due diligence, provided channels are available at that time. We will also permit DomVid to split the channels of its first satellite, as requested in its February 28 amendment, to provide three channels of eastern service and three channels of western service, until such time as its second satellite is launched, regardless of which western satellite orbital position it elects. Again, DomVid will be obliged to meet any protection constraints necessary to conform to U.S. agreements pertaining to the Region 2 Plan.

12. As "due diligence" has not yet been demonstrated (see paras. 15, 16, *infra*), specific channels cannot be assigned at this time. In this regard, we also note that DomVid's channel preferences are unclear, as

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[10] *See In re STC, supra* at ¶¶4-7.

[11] In fact, DomVid would diminish the demand for the most sought after orbital position, 148°W, by this change.

[12] In *DBS Processing Procedures, supra* at 255, the Commission specifically stated that "Applicants seeking domestic authority to implement DBS systems that are not in conformity with the Region 2 Plan ... should give the Commission very detailed technical data on the effects of the proposed deviation on the assignments specified" in the Plan. We expect DomVid to make such a contribution to our analysis as soon as the computer modifications make that process feasible.

they have changed with its various submissions to the Commission. Accordingly, DomVid is directed to advise the Commission of its preferred channels from among those available at the time it completes its due diligence demonstration, and the reasons, if any, for that particular selection.[13]

13. DomVid has also proposed to serve Alaska, Hawaii, Puerto Rico and the Virgin Islands from 119°W (or, in the alternative, to serve Puerto Rico and the Virgin Islands from 119°W and Hawaii and Alaska from 148°W). Service to these areas from these orbital positions was not provided for in the Region 2 Plan. DomVid has stated in its modification application and again in its amendment that such service is feasible and that it will supply confirming data. The Commission's own preliminary analysis indicates that international protection constraints may prohibit such service. However, it is unnecessary to make such a determination at this time, as no authorization is being issued. Confirming data from DomVid and/or Commission analysis will be required before such an assignment can be made, and any such assignment would be made subject to the restrictions and reservations already pointed out with regard to DomVid's proposed western service from 119°W.[14]

14. DomVid has submitted only a vague proposal for its tracking, telemetry and command (TT&C) functions,[15] and none for its earth station uplink facility. As the time required for construction of these facilities is shorter than for a satellite, it is not necessary for any permittee to begin their construction at the same time. Nonetheless, we assume that these proposals and applications will be submitted promptly. We advise DomVid that, in order to facilitate planning by the Commission and other current and potential DBS permittees, it may be required to submit its proposal for TT&C functions at some specific date in the future.[16] As the channels to be utilized for its uplink will correspond to its broadcast channel assignment, its earth station application can be tendered whenever prudent business judgment dictates.

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[13] The Commission has stated its intention to accommodate the "reasonable preference" of permittees in orbital and channel selection. *DBS Processing Procedures, supra* at 253.

[14] If the necessary analysis is incomplete at the time DomVid's primary authorization is granted, these service specifications can be added at a later date pursuant to a minor amendment, presuming DomVid re-uses the same channels which will have been assigned to it.

[15] DomVid has only stated, in its modification application, that it intends to use the 5915-5925 MHz and 3690-3700 MHz bands with an omni antenna on the spacecraft and a 5 meter antenna on the ground for its TT&C, with 20KHz bandwidths.

[16] We note that facilities must be assigned at a relatively early date to begin the construction of the antenna and associated equipment which must be ultimately incorporated into the spacecraft, and thus any such requirement should present no undue hardship on the permittee.

15. DomVid has not yet satisfied the "due diligence" requirement of Section 100.19 of the Commission's rules (47 C.F.R. §100.19) by beginning construction or completing contracting for the construction of the satellites for which it seeks approval. In its February 28 amendment, it claimed that construction was begun by Hughes Aircraft Company on February 1, 1984, under a "memorandum of understanding" entered into on February 10, 1984. It stated that the memorandum of understanding includes cost, technical, design and delivery features. In a letter of March 27, 1984, to the Commission staff, DomVid repeated its claim of due diligence, stressing the fact that construction had begun on February 1, and submitted the transmittal letter from Hughes, which accompanied the contract it currently held, which incorporated the provisions of the memorandum of understanding. It also included several pages of the contract relating to payment terms (without actual dollar amounts), and payment and construction schedules. DomVid acknowledged at that time that the final contract had not yet been signed and would be signed in the near future. The contract is apparently predicated upon the confirmation of a letter of credit for a substantial sum of money. The Commission has received no notification of the signing of the contract.

16. The Commission will look at a variety of factors in determining whether an applicant or permittee has shown due diligence by demonstrating the completion of contracting for the construction of its satellite(s), and DomVid's showing provides a case in point.[17] A contract exists which, once signed by DomVid, will contain no unresolved contingencies which could preclude substantial construction of the satellite. The contract identifies the specific satellites and their design characteristics, as well as specific dates for the start and completion of construction. These provisions are reported to the Commission. DomVid has also indicated the payment terms and payment and construction schedules (in this case by the submission of that part of the contract itself), which indicate the certainty of the plan and the reasonableness of its projection for completion, as well as the permittee's investment/commitment to its completion. This information is verified by both parties to the contract, in this case by submission of actual contract provisions and the transmittal letter from Hughes. Given this information, if the contract were fully executed, both parties' commitment to the completion of construction would be sufficiently evident to warrant assignment of orbit/spectrum resources to DomVid and it would be unnecessary for the Commission to require the submission of the actual contract for inspection, as all

[17] The Commission might consider some lesser showing from a DBS permittee seeking authorization for a second phase for additional satellites to complete a system, as its commitment is evidenced, and further compelled, by its initial system and the investment it represents.

information relevant to the Commission's consideration is specified and verified by both parties to the contract. The only critical element remaining is the ratification of the contract by DomVid. Although actual construction may be underway, this is not sufficient where the terms under which construction will continue are not agreed upon and the provision preventing final ratification of the contract appears to be a critical one which would cancel the entire project. Upon notification by DomVid that the contract has been signed, the Commission will assign to DomVid the orbital position(s) and channels it requests, as set forth above, if they remain available.[18]

CBS, Inc.

17. CBS originally proposed to provide DBS service to the entire United States, including the major population centers in Alaska and Hawaii, from four satellites with each satellite providing three signals into a single time zone (quarter-CONUS). It proposed to deliver high definition television service ("HDTV"), which consists of 1050 scanning lines and a 5:3 aspect ratio, instead of the current standard NTSC's 525 scanning lines and 4:3 aspect ratio. HDTV would thus provide a significantly better picture with much higher image resolution. To implement its HDTV proposal, CBS anticipated the need for 27 MHz or greater channel bandwidths. At the time, all other applicants proposed bandwidths of 18 MHz - 24 MHz, and that was the bandwidth anticipated by the Commission to result from RARC-83. *In re CBS, supra* at 103. The Commission granted CBS a construction permit for its first phase (Eastern time zone) service to deliver HDTV "subject to the conditions that additional channel bandwidth be assigned subject to a sufficient showing of need and adequate spectrum availability."[19]

18. CBS's timely filed modification application requests six channels at each of two locations (101°W and 148°W), instead of the original three channels at each of four locations. It proposes to use two standard 24

[18] As all significant issues regarding DomVid's application are resolved in this Order, the assignment of specific channels and orbital positions can be made by the Commission staff under delegated authority upon DomVid's demonstration that it has signed its contract with Hughes. We note that DomVid has filed a submission concerning the status of its contract with Hughes on this date, June 15, 1984. This submission is not considered herein, but will be subsequently reviewed by the staff. Other applications which do not present novel questions of fact, law, or policy may also be granted by the staff.

[19] The grant was also conditioned on the submission and Commission review of cost estimates by CBS. *In re CBS, supra* at 108, 110. Those cost estimates were timely submitted on February 1, 1983, and appear to be reasonable. Of course, the more significant test of any permittee's financial qualifications, at this point, is compliance with the due diligence requirement. *Report and Order* in Gen. Docket No. 80-603, 90 FCC 2d 67 (1982).

MHz transmission channels for each channel of HDTV service delivered, so that it would be providing three channels of HDTV service from each six-transponder satellite. CBS asserts that these paired channels must have same sense polarization in order to be combined for HDTV transmission and reception. In its modification application, CBS also asserts that it has met the due diligence requirement by virtue of its long-standing involvement in the development of DBS service and HDTV technology, and its continuing contractual relationship with TRW, Inc., a satellite design and manufacturing company. TRW has recently provided CBS with a detailed contract proposal for the construction of CBS's proposed eastern satellite based on plans and proposals developed under prior contracts between the parties. CBS has indicated that it has until mid-July, 1984, to accept and sign the contract. At the time it submitted its modification application, CBS also filed a statement indicating that it was pursuing a possible joint venture with STC, which would provide for a joint DBS service, requiring colocated and copolarized satellite facilities.

19. DBSC and USSB contend that CBS's modification application requires the use of more spectrum than originally proposed and therefore constitutes an unacceptable major amendment of its application. DBSC also argues that the Commission rejected CBS's proposal to use one channel for delivery of HDTV to terrestrial stations for retransmission, and was therefore entitled to only two channels of service. It continues that even if CBS were entitled to three channels of 27 MHz, that is only 81 MHz total, as opposed to the six channels of 24 MHz, 144 MHz total, CBS now requests. USSB similarly argues that while CBS originally proposed to use only three channels, it now requests six channels (48 MHz per channel of service as opposed to its original 27 MHz per channel of service), while reducing its commitment to HDTV by providing HDTV only on an "experimental basis" and on fewer channels. USSB additionally argues that approval of CBS's proposal will limit the overall diversity provided by DBS service, as three fewer channels of service will be provided (due to CBS's use of three channels for "augmentation" to form its HDTV signal). It implies that this is CBS's specific intention, to minimize DBS competition with CBS's own terrestrial broadcast network. DBSC suggests that CBS could "try more aggressively" to squeeze its HDTV signal into a 24 MHz bandwidth.

20. We find no merit to these arguments. In adjusting its original proposal, CBS was properly conforming its application to the technical parameters established at RARC-83. CBS's original specification of 27 MHz channels was clearly tentative,[20] and this was so recognized by the Commission, which clearly anticipated the need for wider bandwidths and/or paired channels when it conditionally granted CBS's construction

[20] CBS Application for Construction Permit, Technical Section, p. (ii).

permit.[21] The need for paired channels has been throughly documented by CBS in its modification application, and is uncontroverted by petitioners. Furthermore, use of paired channels will permit CBS to provide HDTV service in a mode that standard television equipment can receive (without the picture augmentation characteristics). This universal reception may be critical to the acceptance and marketability of this new dimension in television service.[22] The availability of the required channels is now clear, too, and the modified proposal requires less bandwidth than already conditionally approved. It is now seeking the use of six 24 MHZ channels for its entire eastern half U.S. service, whereas it originally requested six 27 MHz channels for the same service area (three channels for each of two orbital positions, one for Eastern and one for Central time zone services). (An identical analysis obtains with respect to its western service proposal.)[23]

21. Despite HDTV bandwidth requirements, the Commission expressed its interest in encouraging HDTV experimentation, as well as other technological innovations that might be used in conjunction with DBS, when authorizing DBS service. Preparations for RARC-83 also specifically included consideration of HDTV requirements. *Report and Order* in Gen. Docket No. 80-603, *supra* at 717-18. The Commission recognized even then that HDTV would require significantly more bandwidth, thereby reducing the number of channels, but determined to leave it to the marketplace to determine whether such usage would be justified. *Id.* CBS's efforts in developing this service, and the considerable expense involved in its development and delivery, contradict any argument that CBS is warehousing channels merely to reduce competition for its terrestrial broadcast network. The number of other channels available for DBS service further dispels any notion that an applicant could expect to effectively employ such a tactic. The Commission's previous determination that one channel of service should not be used for terrestrial rebroadcast did not reduce the number of channels which CBS was granted, but rather qualified CBS's intended use of the three channels granted to it in *In re CBS, supra.*

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[21] "Based on preparations for the 1983 RARC, it now appears that wider bandwidths may be necessary to transmit HDTV signals. For example, recent discussions in the FCC RARC Advisory Committee indicate that HDTV could be provided by combining 2 conventional (18-24 MHz) DBS channels." *In re CBS, supra* at 103.

[22] CBS proposes to provide a standard signal on one channel, using the second channel in the pair to transmit all of the "augmentation," or additional information that will increase the resolution and alter the aspect ratio.

[23] USSB and DBSC argue that not all channels and orbital positions are equal, and that merely requesting more channels in one position constitutes a major change and infringes on their rights to those same channels. This argument was considered and rejected in *In re STC, supra* at ¶¶6, 7.

22. CBS has submitted no proposal for its TT&C functions, and little information regarding its earth station.[24] As discussed in conjunction with DomVid's application (para. 14, *supra*), CBS is expected to submit a TT&C proposal promptly. An earth station application can be submitted when CBS deems it appropriate.

23. DBSC argues that a joint venture proposed by CBS and STC is contrary to the public interest, as it would limit program diversity, minimize competition among DBS operators, and waste spectrum. USSB does not attack the joint venture itself, but joins DBSC in opposing CBS's request for channels at the same orbital position with the same polarization as STC's assigned channels, particularly as they are six "middle" channels adjacent to STC's six middle channels.[25] They claim that the remaining four copolarized channels are rendered virtually useless as they are in pairs of two, separated by the entire DBS spectrum. They continue that with STC's and CBS's professed plans to market single-polarized antennas,[26] the CBS/STC entity would control twelve of the sixteen channels available to most viewers. In the same vein, USSB argues that granting CBS channels that are copolarized with STC's would harm the public interest because it would reduce the number of DBS channels deemed most viewable and most desirable (*i.e.*, those colocated and copolarized with STC's), because of CBS's "waste" of three channels for HDTV transmission. It contends that because HDTV requires unique receiving equipment anyway, it should not use channels which could utilize the standard receiving equipment STC intends to market.

24. The channels CBS requests, colocated and copolarized with STC's, will be assigned, if available, when CBS fully qualifies for channel and orbit assignment. The channel and orbital choice is a "reasonable preference," given the possibility of a joint venture between STC and CBS, as it would simplify equipment, transmission and marketing considerations. There has been no showing that the even numbered channels remaining at 101°W are any less likely to be efficiently utilized than if the assignments were made in some other configuration. The number of DBS applicants and channel requests promises that numerous channels will be used at both polarizations. Thus, it is not evident that STC

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[24] CBS has noted the uplink channels it would use, and that they would employ opposite polarization from its broadcast (downlink) channels. It also gives the general location of its earth station.

[25] STC has been granted channels 6, 8, 10, 12, 14, 16; CBS requests channels 18, 20, 22, 24, 26, 28. This would leave channels 2, 4, 30, and 32 (as well as all odd channels) available at 101°W.

[26] At any orbital position, half of the thirty-two broadcast channels are polarized right hand circular (odd channels) and half are polarized left hand circular (even channels). Receiving equipment discriminates between these polarizations, and must be specifically designed to receive both polarizations.

and DBS will collectively control "twelve of the sixteen channels available to most viewers," and in any event the Commission has specifically declined to place restrictions on ownership during this interim period. *Report and Order* in Gen. Docket No. 80-603, *supra* at 711-13. Furthermore, no applicant is prohibited from advertising the virtues of or from marketing universal receiving equipment that can receive all channels.[27] As previously stated, the use of three extra channels for HDTV transmission is a decision which will be tested in the marketplace, and is particularly appropriate for experimentation in DBS service.

25. Hughes and USSB argue that CBS's "due diligence" showing is insufficient,[28] and Hughes is concerned that its acceptance will also set a bad precedent for other first-round applicants, thereby permitting them to reserve the spectrum prematurely and preempt second-round applicants which may be ready to perform.

26. The Commission agrees that specific channels and orbital positions cannot be assigned to CBS at this time, as it has not yet met the Commission's due diligence requirement. While we recognize the efforts

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[27] USSB argues that universal or retrofitable equipment is only marginally more expensive than the single-polarized equipment STC and CBS intend to market. The applicants' plans in this regard are presently unclear, and in any event, we are not convinced that Commission intervention is appropriate at this time. An industry DBS Standards Advisory Committee is considering receiver standards, and it will be completing a report for the Commission's consideration in the near future.

[28] Also, USSB has pointed out recent public statements by Thomas Wyman, Chairman of the Board and Chief Executive Officer of CBS, Inc. and Gene Jankowski, President, CBS Broadcasting Group:

> 'We can't do DBS on our own,' Wyman said . . . Conceding lack of specific DBS plans, CBS Bdcst. Group Pres. Gene Jankowski stressed that DBS was still important to CBS . . . [*Television Digest*, March 19, 1984, at 5.]
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> 'As you know, we're involved in a serious look . . . at DBS . . . We have set aside a period until July to see in what combination we might think regarding a partnership in that area . . . there are a large number of unresolved matters. Such as: . . . how we pass our own test of doing only those things that we can do better than anybody else. . . . I think it will be three or four months before we have a decision. . . . .' [*Broadcasting*, March 26, 1984 at 42 (interview with Thomas Wyman).]

A recent newspaper article reported that:

> On the [CBS] corporate agenda, for instance, is the complex decision about whether to enter into a risky [DBS] pay television venture with [STC]. . . . While CBS executives are enthusiastic about the videotex (sic) business, they are less certain about the DBS effort. Wyman said the question is whether the venture can keep DBS installation costs per household in the $300 to $400 range . . . Indications are that CBS officials are unsure about the economics of DBS and that a decision on whether to proceed with [STC] will be made in early summer. [*Washington Post*, May 13, 1984, at G4.]

CBS has made to date in developing DBS and HDTV technology, and the peculiar obstacles it has faced in alone developing HDTV service, it is in possession of a contract for the construction of its satellite that it has not signed as of this date. When CBS advised the Commission that it has signed the contract from TRW (or another), and includes the type of confirming information outlined in the discussion regarding DomVid's due diligence showing (para. *16, supra*), or some equivalent demonstration, the Commission will be sufficiently satisfied as to the parties' commitment to the completion of construction to warrant the assignment of orbit/spectrum resources to CBS for its eastern satellite.[29] [30] Resources will be assigned for CBS's anticipated western satellite when a due diligence showing is made for that satellite. See *In re STC, supra* at paras. 8, 9.

27. Accordingly, IT IS ORDERED, That the "Consolidated Petition to Deny and Comments" and the "Petition to Deny" Dominion Video Satellite, Inc.'s February 28, 1984 amendment, filed by Direct Broadcast Satellite Corporation ARE GRANTED, to the extent indicated above, and ARE DENIED in all other respects.

28. IT IS FURTHER ORDERED, That the "Partial Opposition to the Grant of the Application of CBS, Inc. for Modification" filed by United States Satellite Broadcasting Company, Inc. and the "Partial Opposition" letter filed by Hughes Galaxy Communications, Inc. ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects.

29. IT IS FURTHER ORDERED, That the motions for extension of time filed by all parties ARE GRANTED.

30. IT IS FURTHER ORDERED, That the application of CBS, Inc., File No. 81-02-MP, for modification of construction permit for an Interim Direct Broadcast Satellite System IS GRANTED, as specified herein, to include one satellite with six channels to serve eastern half-CONUS with three channels of service, including high definition television service, provided permittee demonstrates due diligence in the construction of it satellite by July 17, 1984.[31] [32]

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[29] USSB insists that the Commission must have a copy of the actual contract and make available to the public those portions of it which do not contain proprietary information, in order to have a "reasoned basis" for our decision. The Commission has determined, however, that a showing such as that proferred by DomVid provides sufficient information upon which to base this decision, and assignment of channels and orbits can be made by the Commission staff under delegated authority when an adequate showing is made by CBS and other DBS permittees. See n. 18, *supra.*

[30] By letter of April 2, 1984 DBSC also claims to have met the Commission's due diligence requirement by signing a contract for the construction of its satellites. However, DBSC has not proferred sufficient information regarding that contract to demonstrate compliance with the due diligence requirement.

[31] *See DBS Processing Procedures, supra* at 253.

31. IT IS FURTHER ORDERED, That the application of Dominion Video Satellite, Inc., File No. 81-08-MP, for modification of construction permit for an Interim Direct Broadcast Satellite System IS GRANTED, as specified herein, to include two satellites with six channels each to serve eastern half-CONUS with six channels and western half-CONUS with six channels, one satellite located at 119°W and one satellite located 119°W or 148°W, as permittee shall specify upon its showing of due diligence, provided permittee demonstrates due diligence in the construction of its satellites by July 17, 1984.[33] [34]

32. IT IS FURTHER ORDERED, That the Mass Media Bureau shall send by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to each of the parties to this proceeding.

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WILLIAM J. TRICARICO, *Secretary*

[32] This grant does not include assignment of these orbital positions or of specific channels or authorization to launch; such assignments will be made, subject to their availability at the time, by the Commission staff under delegated authority, when the party demonstrates due diligence. *See* ¶26, *supra.* With respect to CBS, Inc. such assignment will include the reservation of six channels from among those designated for western service. See *In re STC, supra* at n. 17.

[33] *See* n. 31, *supra.*

[34] *See* n. 32, *supra.*

Computing Devices

Order denied petition for rule making to exempt digital electronic organs from the computing device rules under Part 15, Subpart J. Computing devices are any electronic piece of equipment which utilizes digital functions with clock frequencies in excess of 10 kHz. Regulations limiting the interference potential of computing devices were adopted through the proceedings in Docket Nos. 20780 and 80-284, notably technical standards and equipment authorization programs.
—*CBS, Inc.*

FCC 84-378

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CBS, Inc. petition to exempt digital electronic organs from Part 15 of the FCC Rules	RM-4460

ORDER

Adopted: July 30, 1984; Released: August 1, 1984

BY THE COMMISSION:

1. On May 20, 1983, CBS, Inc. (CBS) filed a petition for rulemaking seeking establishment of an exemption from the computing device rules Part 15, Subpart J, for electronic and pipe organs utilized primarily by churches or other institutional users. This petition was put on public notice on June 2, 1983. Grecni Music Company, Inc., a retailer of musical instruments, filed the only comment.

2. CBS, in addition to its well known role as a broadcaster, also manufactures electronic organs that utilize digital electronics. Because these organs utilize digital electronics, they fall within the definition of a computing device given in Section 15.4(n) of the Rules, and are therefore subject to the requirements in Part 15, Subpart J.[1] These requirements are designed to control interference to TV and radio communications that

[1] A computing device is defined under Section 15.4(n) of the FCC Rules as any electronic device or system which generates and uses timing signals or pulses at a rate in excess of 10 kHz and uses digital techniques. This broad definition applies not only to computers

can be caused by digital electronic equipment. The regulations were first adopted on September 18, 1979, by *Report and Order* in FCC Docket 20780, 44 FR 59530, October 16, 1979, following a groundswell of complaints of interference caused by a variety of digital electronic equipment. The rules were later modified by *Order Granting in Part Reconsideration* in Docket 20780, adopted March 27, 1980, 45 FR 24154, April 9, 1980, to revise the implementation schedule and to make other administrative changes. A final compliance date of October 1, 1983, was set which required that all computers manufactured after that date comply with these rules.

3. Most computing equipment, including digital electronic organs, is subject only to verification of compliance, a procedure whereby the manufacturer is required to test the device to determine that it meets FCC emission limits, to place a compliance label on the device, to insert information in the user instructional manual, and retain a copy of the verification records in the company files. Submittal of information to the Commission is not routinely required. Only personal computer equipment is subject to the more rigorous certification procedure, which requires submittal of a written application to the Commission for review. [Details on the verification and certification procedures are given in Part 2, Subpart J of the Rules. Complete information on the computing device rules can be found in Office of Science and Technology (OST) Bulletin 62 "Understanding the FCC Regulations Concerning Computing Devices," available from the FCC Consumer Assistance Office].

4. Five categories of equipment are specifically exempted from the computing device rules.[2] The exempt categories are listed in Section 15.801(c), and can be summarized as follows: equipment used in transportation vehicles; electronic control or power systems utilized by a public utility or in an industrial plant; test equipment; appliances; and, professional type medical equipment. Although exempt from compliance with the specific technical and other requirements, the equipment remains subject to the general non-interference requirement of Section 15.803.

5. Digital technology is utilized in organs for tone generation and console operation. The use of digital electronics for console operation, e.g. for determining which keys are depressed and for selection of the voices of the instrument, volume control, octave couplers etc., is common to organs intended for use in the home and those intended for use in

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and peripherals, but also other devices, such as electronic organs, which utilize digital circuitry.

[2] See in particular paragraphs 52-65 of the *Order Granting In Part Reconsideration* in Docket 20780. See the *Report and Order* in General Docket No. 81-461 in the matter of request of General Electric Co. to exempt medical diagnostic equipment from Subpart J of Part 15 of the Rules, released July 9, 1982, 47 FR 31266, July 19, 1982.

institutions. Until recently, digital electronics for tone generation has been used primarily in home organs, but because it does not satisfactorily reproduce the sound of an authentic pipe organ, has not been used extensively for institutional organs. Instead, conventional analog techniques are used to generate the musical notes. However, at least one manufacturer of institutional organs utilizes an alternative digital technique for direct generation of complex audio waveforms. CBS anticipates that this type of digital tone generation may find increasing application as the cost of the digital electronic components becomes more attractive than the cost of their analog counterparts.

6. In requesting an exemption, CBS explains that the institutional electronic organ market is a relatively stable one in which four manufacturers predominate. It estimates that a total of 3,000 units of this type are sold annually from a selection of 30 models. CBS does not believe that its electronic and pipe organs constitute a source of interference to the reception of radio and television broadcasts and to other spectrum users, warranting application of Part 15 of the Commission's Rules. No measurement data or technical analysis was submitted to support this statement. CBS's belief that the interference potential is minimal appears to be predicated on its assertions that this equipment is typically separated from other spectrum users by a considerable distance and that church organs are used relatively infrequently, e.g. a few times a week. CBS points out that to its knowledge there have been no complaints of interference caused by church organs utilizing computing devices. According to CBS, the cost of testing each electronic church organ would be unduly expensive, and in view of low product volumes, there would be a marked effect on the cost of each unit to the purchaser. CBS does not elaborate on the reasons why the testing presents unique problems, nor does it provide any specific information as to the costs of compliance. Grecni Music Co., Inc. supports the request for exemption, but furnishes no additional information.

7. We are not persuaded that there is justification for exempting electronic and pipe organs utilized primarily by churches or other institutional users from the computing device rules. CBS has not shown that the digital circuitry used in electronic organs is inherently less noisy than digital circuitry employed by other devices, such as computers or electronic games, which have been found to cause interference. While we have no actual reports of interference attributable to organs, it must be recognized that sources of radio frequency interference are often difficult to identify and locate. It must also be remembered that because this technology has only been introduced in recent generations of organs, the population of such units is likely to be small at present time. Although CBS focuses its discussion on organs intended for use in churches or

institutions, in practice it would be extremely difficult to categorize any given organ as intended for home vs. institutional use. It is not unusual for expensive instruments to be purchased for use at home. In any event, the argument that institutional or church organs will be far removed from communications users has little merit since small and medium size churches are frequently located in the midst of residential neighborhoods. Furthermore, the use of church organs is not restricted to Sunday services and, in many areas, is increasing significantly with the commensurate increase in church related activities.

8. If there are any obstacles to performance of the required measurements they are not apparent to us. The FCC measurement procedure pertaining to this equipment, MP-4, "FCC Methods of Measurement of Radio Noise Emissions from Computing Devices," provides a full range of options and approaches for testing digital electronic equipment.[3] For instance, the equipment may be tested at an open field test site or, under certain conditions, at the manufacturer's facilities or user's premises.

9. We believe that it is important for manufacturers to be made aware that digital electronic circuitry is capable of emitting considerable levels of radio noise which should be properly considered and controlled at the design stage. This is particularly important in the instant case where the use of digital electronics in organs is relatively new and is expected to expand in the future. Since the equipment in question is subject only to manufacturer verification of compliance, we consider the existing requirements for this equipment to be minimal.

10. For the reasons given in the foregoing discussion, IT IS ORDERED that the CBS petition for exemption of digital electronic and pipe organs from Part 15 IS DENIED.

11. For further information concerning this Order, contact Liliane M. Volcy, Office of Science and Technology, telephone: (202) 653-8247.

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WILLIAM J. TRICARICO, *Secretary*

[3] MP-4 is available from the FCC duplicating contractor: International Transcription Services, 1919 M Street, N.W., Room 248, Washington, D.C., 20554, tel. (202) 296-7322.

Advertising, Excess Commercials
Advertising, Program Length Commercials
Announcement, Commercial
Deregulation
Over-Commercialization

The public interest no longer requires the Commission to resort to processing guidelines to limit the number of commercial minutes per hour that commercial television stations may present. Instead, market forces impose a natural limitation on commercialization given the preferences of listeners and advertisers for lower levels of commercialization.

—*Commercial TV Stations*
MM Docket No. 83-670

Logging of Commercials
Logs
Logs, Retention of
Program Logs, Public Inspection of

Program logs no longer need to be maintained by commercial television stations. In its place will be a quarterly obligation to file an issues/programs list in each television station's public inspection file.

—*Commercial TV Stations*
MM Docket No. 83-670

Licensee, Responsibility in Programming
Programming
Programming, Licensee Control of
Programming Local

The public interest does not require the imposition of quantitative guidelines relative to the provision of informational, local and nonentertainment programming. Market incentives ensure that licensees will present programming that is responsive to the needs of their communities. Accordingly, there is no need for the current guidelines and a generalized requirement to address issues facing the community with programming is sufficient to assure operation in the public interest.

—*Commercial TV Stations*
MM Docket No. 83-670

Community, Ascertainment of Needs
Deregulation
Discretion of License, in Community Ascertainment
Primer, Ascertainment of Community Problem
Programming Planning
Programming Requirements

Formal community ascertainment procedures are eliminated for commercial television applicants. Instead the focus of the Commission will be upon programming proposals filed by competing applicants and the program responses to community issues offered by licensees. The Commission will not be concerned with the process by which applicants determined what programming to propose or determined to which issues to respond.
—*Commercial TV Stations*
MM Docket No. 83-670

FCC 84-293

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations.	MM Docket No. 83-670

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 27, 1984; Released: August 21, 1984

BY THE COMMISSION: CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

I. Introduction

1. Before the Commission for consideration are comments filed in response to the *Notice of Proposed Rule Making* in the above-captioned proceeding.[1] The *Notice* solicited comments on several proposals that would amend the Commission's policies with respect to programming, ascertainment, commercialization and program log requirements for commercial television station licensees.

2. After an exhaustive review of the record in this proceeding, our independent study of the economic incentives for the delivery of video

[1] *Notice of Proposed Rule Making* in MM Docket 83-670, 94 F.C.C. 2d 678 (1983), 48 Fed. Reg. 37239 (August 17, 1983) (hereinafter "*Notice*").

programming, and a re-examination of the current programming policies, we conclude that modifications to the existing regulatory system are appropriate. Stating our conclusions along the functional lines outlined by the specific rules and policies examined in this docket, we find that market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities. Moreover, we are convinced that these forces will continue to hold levels of commercialization below our existing guidelines. Given these economic and policy conclusions, we no longer believe it appropriate to routinely review the programming, the levels of commercialization, and the formal ascertainment practices of television licensees in the uncontested renewal context. In addition, existing logging requirements should be revised to reflect the policies articulated in this proceeding. Accordingly, a quarterly issues/programs list, similar to that now required of commercial radio broadcasters, is hereby instituted.

3. Our action today constitutes another step in the deregulation of the telecommunications industry. It reflects the importance and viability of market incentives as a means of achieving our regulatory objectives and will provide television broadcasters with increased freedom and flexibility in meeting the continuously changing needs of their communities. Our action here, however, does not constitute a retreat from our concern with the programming performance of television station licensees.[2] Thus, as in related actions involving commercial radio and non-commercial broadcasting, we are by this Order retaining the obligation of licensees to provide programming that responds to issues of concern to the community. The quarterly issues/programs list will provide the public and the Commission with the information needed to monitor licensees' performance under this new regulatory scheme and thus permit us to evaluate the impact of our decision. Existing procedures such as citizen complaints and petitions to deny will continue to function as important tools in this regard. We believe that this approach will fully meet our current regulatory needs with respect to the programming performance of commercial television broadcasters, while permitting the elimination of unnecessary and often burdensome regulations.

4. Our discussion of the issues in this proceeding has been divided into five segments: programming, ascertainment, commercialization, program logs and an analysis of long form audit procedures. Appendix A contains the specific rule changes that result from this proceeding. A detailed evaluation of all comments filed in this proceeding appears in Appendix B.

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[2] We do not imply that the programming obligations of broadcast licensees, as we have historically viewed them, are not properly subject to review and revision in appropriate proceedings. *See infra* para. 7 and n.7.

An analysis of the competitive status of commercial television can be found in Appendix C. The results of a comprehensive study concerning the levels of informational and local programming on commercial television for the year 1980 have been included as Appendix D.

II:Analysis

A. Program Guidelines

1. Background

5. The guidelines which we are eliminating today originated as informal directions to the staff concerning the routine processing of television renewal applications. The directions indicated which otherwise uncontested applications should be referred to the full Commission for disposition and included both quantitative programming and commercialization standards.[3] The guidelines were amended and made public for the first time in 1973, in conjunction with a general revision of the Commission's delegations of authority to the former Broadcast Bureau.[4] As to program performance, the revised guidelines provided only that renewal applications demonstrating less than 10 percent non-entertainment programming could not be routinely processed by the staff. The current programming criteria were adopted in 1976 and require Commission action on any commercial television station renewal application reflecting less than five percent local programming, five percent informational programming (news and public affairs) or ten percent total non-entertainment programming.[5]

2. Proposals

6. The *Notice* contained three policy alternatives to the present regulatory system. Under Option I, all programming guidelines would be

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[3] *Notations of General Agenda*, June 28, 1961. According to the notations, the staff could not act upon any applications which proposed any of the following:

(1) greater than 85 percent commercial programming,

(2) less than 5 percent local live programming,

(3) greater than 90 percent network programming,

(4) less than 10 percent sustaining programming between 6-11 p.m.,

(5) greater than an average of 12 commercial spot announcements during an hour, and

(6) no programming in the following categories unless an adequate explanation was given: entertainment, religious, agricultural, educational, news, discussion (forum, panel, roundtable), and talks (all conversational not falling under one of the above categories).

[4] *See Order* (*Amendments to Delegations of Authority*), 43 F.C.C. 2d 638, 640 (1973).

[5] *See Order* (*Amendments to Delegations of Authority*), 59 F.C.C. 2d 491, 493 (1976) and 47 C.F.R. §0.283 (a)(7)(i)(A), (ii)(A).

eliminated, but television broadcasters would operate under a general obligation to address issues of concern to their communities. Thus, the Commission would no longer routinely consider categories and amounts of programming in the uncontested renewal context. This option would also eliminate the promise versus performance standard. Option II would retain a process of Commission review at the renewal stage based upon performance in the existing program categories and current promise versus performance standard, but would ease the rigid application of the guidelines, thereby allowing licensees to experiment with non-entertainment programming. This could be done by either lowering the percentage standards in the delegations, or by permitting a licensee to explain to the staff the reasons why its programming performance does not meet the guidelines. We also sought comment on a third policy alternative that relied solely on statutory requirements. Under this approach, there would be no programming obligation of any kind except for those programming requirements that are explicitly statutory in nature.[6] Accordingly, absent statutory violations, the Commission would no longer consider programming in the licensing of broadcast stations. In addition to the aforementioned policy alternatives, we stated that we would consider any other deregulatory proposal submitted in response to the *Notice.*

3. Discussion

7. Our review of the record herein convinces us that the current programming guidelines and the routine review of program performance in uncontested renewal proceedings that they facilitate are not necessary to the effective discharge of our licensing responsibilities. Accordingly, we adopt Option I as contained in the *Notice,* eliminating the programming guidelines entirely. In addition, the promise versus performance standard will no longer be applied by the staff in the uncontested renewal context. In reaching this conclusion, we reject Option II as contained in the *Notice.* While this option would relax the specific requirements of the guidelines, it would retain a category-based, quantitative approach to evaluating a licensee's programming performance. As will be discussed later in this document, we do not believe that such an approach is necessary or appropriate given our view of the television marketplace and the nature of licensees' underlying programming obligations. We also have elected not to pursue the statutory reliance option in this proceeding. We believe the issues raised by the statutory option are significant and warrant full examination by the Commission. This policy alternative, however, would affect the programming responsibilities of all broadcasters, not just commercial television licensees. Therefore, we intend to

[6] *See Notice supra* n. 1 at 37250 (discussing the program requirements envisioned by this policy alternative).

examine these issues elsewhere.[7]

8. Our decision to eliminate the processing guidelines is based on two fundamental considerations. First, our review of the record and study of station performance persuades us that licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines. *See F.C.C. v. WNCN Listeners Guild,* 450 U.S. 583, 594 (1981) (hereinafter *F.C.C. v. WNCN*); *National Association of Regulatory Utility Commissioners v. F.C.C.,* No. 83-1225, slip op. at 109 (D.C. Cir. 1984) (hereinafter *N.A.R.U.C. v. F.C.C.*); *M.C.I. Telecommunications Corp. v. F.C.C.,* 627 F.2d 322 (D.C. Cir. 1980). *See also infra* n. 33. Second, our re-examination of the current regulatory scheme reveals several inherent disadvantages, including: potential conflicts with Congressional policies expressed in the Regulatory Flexibility Act and the Paperwork Reduction Act,[8] imposition of burdensome compliance costs, possibly unnecessary infringement on the editorial discretion of broadcasters, and distortion of the Commission's traditional policy goals in promulgating and monitoring programming responsibilities. We now turn to a more detailed discussion of these issues.

(a) Need for the Guidelines

9. *Existing Market Performance.* Our review of the programming performance of commercial television stations is comprised of three separate studies. The first focuses on overall station compliance with the existing guidelines from 1973 to 1979. The second study examines the average performance of UHF independent stations both before and after they were exempted from the existing programming guidelines in 1976. A final study consists of an econometric examination of programming behavior for 1980.

10. Overall station data indicate that during the six year period from 1973 to 1979, commercial television broadcasters allocated an average of 13.7 percent, 10.3 percent and 24.3 percent of their broadcast time to informational (news and public affairs), local and overall non-entertainment programming respectively.[9] These programming levels far exceed our present guidelines in every program category. Specifically, they represent performance at 274 percent of the guideline standard for informational programming, 206 percent for local programming and 243 percent for total non-entertainment programming.

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[7] We emphasize that we in no way prejudice this proposal. We conclude only that the major matters raised in this docket can and should be resolved here and that any further action on the statutory reliance alternative should await a more complete discussion in separate proceedings.

[8] Regulatory Flexibility Act, PL 96-354 (1980), 5 U.S.C. §601 *et seq.*; Paperwork Reduction Act of 1980, PL 96-511, 44 U.S.C. §3501 *et seq.*

[9] *Notice,* at 37252, Table 1.

11. Moreover, the record indicates that there has been a trend toward increasing amounts of total non-entertainment programming on television. In 1973, commercial television stations devoted 22.6 percent of their time to this program category. By 1979, this amount had risen to 26.1 percent.[10] A similar trend exists for informational programming.[11] In 1973, 13.3 percent of television broadcast time was devoted to informational programming. By 1979, this average had increased to 13.9 percent.[12] By 1980, commercial television stations devoted 15.26 percent of their time to informational programming, more than three times the level set by the guidelines.[13]

12. Within the informational programming category, the data also reveal a nearly constant relationship between the amounts of news and public affairs programming presented over time. Between 1973 and 1979 the percentage of public affairs programming averaged 4.6 percent and ranged from 4.3 percent to 5 percent. During this same period, news programming averaged 8.9 percent and ranged from 8.6 percent to 9.2 percent.[14] Moreover, this relationship persisted despite the fact that there was no informational programming guideline prior to 1976 and, that even after the informational programming requirement was adopted, there was no guideline with respect to the specific amounts of news and public affairs programming. It would appear, therefore, that there has been a stable market demand over time for both news and public affairs

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[10] The breakdown by various television stations for total non-entertainment programming for the years 1973 and 1979 was as follows: VHF affiliated stations increased from 23.6 percent to 25.3 percent; UHF affiliated stations increased from 20.5 percent to 25 percent: and UHF independents increased dramatically from 18.2 percent to 34.6 percent. The only decline in this program type occurred for VHF independents (20.6 percent to 18.3 percent).

[11] *Notice* at 37252, Table 6.

[12] *Id.* at Tables 2, 3, 4, and 5. The increase for the various television media for news and public affairs programming from 1973 to 1979 was as follows: VHF affiliates (14.4 percent to 15.5 percent); UHF affiliates (12.1 percent to 13.2 percent); and UHF independents (7 percent to 7.4 percent). A minor decrease in news and public affairs was noted for VHF independents (9.6 percent to 9.1 percent).

[13] *See* Appendix D for analysis of 1980 programming data.

[14] The percentage of time devoted to news and public affairs programming for the years 1973 through 1979 from sign-on to sign-off was as follows: 1973 (8.6 percent news, 4.3 percent public affairs); 1974 (8.6 percent news, 4.5 percent public affairs); 1975 (9.2 percent news, 5 percent public affairs); 1976 (9 percent news, 4.4 percent public affairs) 1977 (9 percent news, 4.6 percent public affairs); 1978 (8.8 percent news, 4.3 percent public affairs); and 1979 (9.1 percent news, 4.8 percent public affairs). Moreover, public affairs programming was presented during periods of high viewership. From 1973 through 1979 the amount of time devoted to public affairs programming from 6:00 p.m. to 11:00 p.m. was as follows: 1973 (5.1 percent); 1974 (2.5 percent); 1975 (5.3 percent); 1976 (3 percent); 1977 (2.9 percent); 1978 (3.3 percent); and 1979 (3.7 percent).

programming and that commercial television stations have consistently met that demand.

13. Data supplied by NAB corroborate these results.[15] NAB found that the amount of time devoted to informational programming increased from 12.8 percent in 1973 to 17.3 percent in 1983. Total non-entertainment programming increased from 22 percent in 1973 to 29.2 percent in 1983.

14. While informational and overall non-entertainment programming have increased, locally produced programming has declined in percentage terms since 1973. The amount of time devoted to local programming by all commercial television stations declined .4 percentage points from 10.5 percent in 1973 to 10.1 percent in 1979.[16] Also, an analysis of 1980 programming data found that the amount of time devoted to local programming had declined to 9.52 percent. Again, NAB data confirm these results, reporting a decline from 11.3 percent in 1978 to 8.9 percent in 1983, a trend which existed for all markets.[17] Despite this percentage decline in local programming, however, the amount of broadcast time devoted to this category remains well above our guidelines.

15. Moreover, in evaluating the above data, it is important to note that the figures cited are percentage averages. They do not, therefore, reflect the significant increase in the absolute supply of programming in the relevant categories resulting from the substantial growth in the number of television stations over time. Since 1973, for example, the number of operating television facilities has increased by approximately 25 percent.[18] Thus, even in such categories as local programming, where there has been a relative decline in the percentage average performance of stations, the absolute number of broadcast minutes devoted to such programming may well have actually increased in many markets. As for total non-entertainment and informational programming, where the average percentage has risen, the growth in television outlets is yet another factor contributing to

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[15] NAB Comment, Appendix B, *NAB Television Programming Study, Final Report on Local Commercial Stations*, 1983. The study examined the programming of 107 local commercial stations in 29 markets, including stations in the top 50, 51-100 and 101+ markets, by analyzing 1982-1983 *TV Guide* listings for these stations. Data for years prior to 1982 were taken from previous NAB studies conducted by James A. Wollert and Michael Wirth in 1982, 1978 and 1976.

[16] *Notice* at 37252, Appendix B, Table 6. A comparison of 1973 programming percentages with 1979 percentages indicates an across-the-board decline in all television media. VHF affiliates (10.4 percent to 10.2 percent), VHF independents (17.9 percent to 14.6 percent), UHF affiliates (7.6 percent to 7.1 percent) and UHF independents (13.4 percent to 12.9 percent).

[17] *See* NAB Comments, Appendix B (local programming declined in all markets during this period (1978 to 1983) from 14.1 percent to 11.6 percent in the top 50 markets; from 8.9 percent to 8.4 percent in markets 51-100; and from 7.6 percent to 6.7 percent in the 101 + markets).

[18] *See* Appendix C (discussion of growth in number of television stations).

an overall increase in the supply of broadcast programming in these categories.

16. Our experience with the performance of television stations that are already exempt from the programming guidelines further supports our belief that the existing processing standards are unnecessary. Independent UHF stations were subject to the programming guidelines when they were first enacted in 1973. In 1976, however, the Commission exempted UHF independents from the program processing guidelines.[19] An examination of the programming performance for these exempted UHF stations reveals that elimination of the programming delegations had no material effect on the amount of informational, local and non-entertainment programs broadcast. Prior to the exemption, the average amount of time devoted to informational, local and total non-entertainment programming amounted to 7.9 percent, 14.5 percent, and 22 percent respectively, whereas programming for the three years after the exemption amounted to 8.2 percent, 13.4 percent and 32.9 percent for the same program categories.[20] Thus, while the percentage of local programming declined somewhat in the post-exemption period, from 14.5 percent to 13.4 percent, it nonetheless remained at levels more than 2 ½ times that prescribed by the guidelines.[21] Moreover, informational and overall non-entertainment programming actually increased after the 1976 exemption and, as with local programming, was provided at levels far exceeding the processing standards.

17. A comparison of the post-exemption performance of the subject UHF stations with other television media reveals that UHF independents actually outperformed some of the television stations that remained

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[19] *Amendment to Delegations of Authority, supra* n. 5, at 492.

[20] The data used in this analysis were taken from Table 5 of Appendix B in the *Notice*. Pre-exemption data were derived by calculating the mean average level of performance, in percentage terms, for the three years preceeding the 1976 exemption. The same method was used to calculate the mean average level of performance during the three year post-exemption period. Programming data for 1976 were eliminated since the exemption was granted during that year.

[21] The evidence does not suggest that declines in local programming are related to the presence or absence of the guidelines. For example, UHF independent stations, on average, devoted more time to local programming during the pre-exemption period than during the post-exemption period. The decline in local programming, however, was even greater for VHF independents during the same period. Thus, during the post-exemption period, UHF independent stations exhibited a decline of 1.1 percentage points in local programming, while VHF independents, which were subject to our guidelines, showed a decline of 2.8 percentage points, from 17.4 percent (pre-exemption period) to 14.6 percent (post-exemption period). If the presence or absence of regulation was the primary factor influencing local programming, then one would have expected the most significant decline in local programming to appear in the unregulated medium, *i.e.*, UHF independents. However, this was not the case.

subject to the guidelines.[22] For example, from 1977 to 1979, UHF independents devoted more time to local programming than either UHF or VHF affiliated stations.[23] Non-affiliated UHF stations also devoted more time to overall non-entertainment programming than all other commercial television stations.[24] We recognize that UHF independents programmed less news and informational programming than other commercial television media. It should be noted, however, that a similar situation existed prior to the 1976 exemption.[25]

18. Finally, our conclusion that television stations' program performance is dictated by market incentives and is essentially independent of our processing guidelines is supported by a third analysis conducted by our own staff concerning programming behavior of commercial television stations during 1980.[26] The study examined the impact of the guidelines on the presentation of informational (news and public affairs) and local programming by comparing the programming performance of exempted UHF independents to all other commercial television stations. Through the use of multivariate regression analysis, the study was able to control for various factors that may influence program performance such as, market size, number of competing stations in a local market, number of competing stations, network affiliation, station revenue and VHF/UHF status. By controlling these variables, the study was able to isolate the impact of the guidelines on the levels of programming. The study found that with respect to local programming, approximately 2 percentage points of the overall non-exempt station average seems attributable to the

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[22] Data for this analysis were taken from Tables 1 through 5 of Appendix B in the *Notice*. The same method of calculating the mean average level of performance for television stations subject to the guidelines (VHF affiliates, VHF independents and UHF affiliates) was utilized in determining pre- and post-exemption performance. *See supra* n.20.

[23] During the years 1977 to 1979, UHF independents devoted an average of 13.4 percent of their time to local programming. During this same period UHF and VHF affiliated stations devoted only 6.9 percent and 10 percent of their time to local programming respectively.

[24] During this time period, UHF independents averaged 32.9 percent overall non-entertainment programming, as opposed to 24.2 percent for UHF affiliates, 19.2 percent for VHF independents and 24.8 percent for VHF affiliates.

[25] During the years 1973 to 1975, UHF independents devoted an average of 7.9 percent of their time to news and informational programming. During this same period UHF affiliates, VHF independents and VHF affiliates stations devoted an average of 12.3 percent, 10.1 percent and 14.8 percent of their time to informational news programming, respectively. This pattern continued after the 1976 exemption. For the years 1977 to 1979 UHF independents devoted an average of 8.2 percent of their time to informational programming, UHF affiliated 12.7 percent, VHF independents 9.7 percent and VHF affiliated 15.1 percent.

[26] *F.C.C. v. WNCN*, supra para. 8, at 591. *See* Appendix D for a complete analysis of these data.

guidelines.[27] Thus, even in a worst case situation elimination of the guidelines would result in an overall level of station performance above the existing standard for local programming.[28] Moreover, the guidelines appear to have no impact on the levels of informational (news and public affairs) programming. Accordingly, it would appear that, absent the current guidelines, overall station performance for informational programming would remain at approximately 15 percent, fully three times the level required by current processing standards.

19. In summary, these three studies provide convincing evidence that existing marketplace forces, not our guidelines, are the primary determinants of the levels of informational, local and overall non-entertainment programming provided on commercial television. It appears, moreover, that these forces have consistently elicited a level of such programming well above the amounts arbitrarily set by our processing criteria. We are confident, therefore, that under current marketplace conditions such programming will continue to be available irrespective of our elimination of the guidelines.[29]

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[27] *See* Appendix D, para. 29, *infra.*

[28] We do not believe that a 2 percentage point decline in locally produced programming is necessarily inconsistent with the public interest. This is especially true where the overall levels of local programming will remain at levels above the present guidelines. Moreover, as the Commission has noted in other contexts, the coverage of local issues does not necessarily have to come from locally produced programming. *See Deregulation of Radio*, 84 F.C.C. 2d 968, 999 (hereinafter "*Deregulation of Radio*"). *See also In re WPIX, Inc.*, 68 F.C.C. 2d 381, 402 (1978) (premise that local needs can be met only through programming produced by a local station lacks presumptive validity).

[29] A footnote in a study submitted by the NAB implied that the presentation of "public interest" programming may decline in a deregulatory environment. *See* Wirth, Bloch and Thompson, *Television and Radio Expenditure Behavior Under the Uncertainty of License Renewal* (April 1982) cited in NAB Comments, App. B. We do not believe that the statements made in the NAB study detract from our conclusions in this proceeding. The NAB study assumes that a relationship exists between the presentation of "public interest" programming and a licensee's perception of the difficulty in getting its license renewed. *Id.* at 7. Thus, in projecting the results of the data, the NAB study assumes that the presentation of "public interest" programming is an indirect cost of the license renewal process. *Id.* at 14. It is on this basis that the NAB study makes an assumption, which some might wish to cite as a conclusion, that "public interest programming" will decline in a deregulated environment. *Id.* at 20, n. 15. The study's own data, however, do not support such an assumption. To the contrary, the NAB study found the relationship between "public interest" programming and the total costs of license renewal was statistically insignificant. *Id.* at 10. In contrast, the staff studies upon which we rely measure the effect of the program processing guidelines on actual station performance. The data in these studies demonstrate that licensees, in the absence of the programming guidelines, will present programming at levels well above the guidelines. We believe that actual performance data contained herein provides a better indication of licensee behavior than an unverified assumption. Moreover, the NAB study does not define precisely the term "public interest" programming. The programming elements in the study appear to have consisted of public service announcements, local and informational

20. *Future Market Incentives.* We are confident, as well, that the market demand for informational, local and non-entertainment programming will continue to be met as the video marketplace evolves. Many new video technologies such as Subscription Television (STV), Multipoint Distribution Service (MDS), Satellite Master Antenna Television (SMATV), Low Power Television (LPTV), Direct Broadcast Satellite (DBS), Multi-Channel MDS (MMDS) and Instructional Television Fixed Service Stations (ITFS) have begun, or are just beginning, to assert themselves in the marketplace.[30] While it is difficult to predict the success of these services, we expect that overall subscribership to these video technologies, excluding cable, will range between 25.7 million and 47 million households by 1990.[31] Cable television service already reaches some 29.9 million subscribers (1984 estimate)[32] and is expected to reach some 58 million by 1990.[33]

21. The emergence of these new technologies, coupled with the continued growth in the number of television stations, will create an economic environment that is even more competitive than the existing marketplace. Given the market-based demand for these types of programming evidenced by our studies of past broadcast performance, this increased level of competition can, in our view, only further ensure the presentation of sufficient amounts of such programming.[34]

22. A synthesis of the above-referenced data yields several significant findings with respect to the programming performance of commercial television station licensees. First, the data reveal that licensees are presenting levels of informational, local and non-entertainment programming that are far in excess of our guidelines. These figures indicate that non-entertainment programming is an important part of broadcasters' financial viability and other aspects of their overall operations and, thus,

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programming. While we recognize that the presentation and production of programming in these categories can be expensive, it is incorrect to assume that such an expense is a "cost" that is not market-dictated. For example, the study appears to have included all informational programming, which includes news programming, as a cost of the licensing process. Such an assumption incorrectly ignores the market demand for news programming.

[30] *See* Appendix C.

[31] *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345 (*Amendment of Syndication and Financial Interest Rules*), 48 Fed. Reg. 38020, 38037, Table 9 (August 22, 1983).

[32] *Television and Cable Factbook 1984*, (Cable and Services Volume) p. 1725.

[33] *Supra*, n. 31.

[34] To the extent that the video marketplace might evolve in the direction of a narrowcasting model, we believe our conclusion in the radio deregulation proceeding that adequate market incentives exist under such conditions to ensure appropriate levels of these types of programming is directly applicable here. *See Deregulation of Radio supra* n. 28 at 969. *See also* Owen, Beebe & Manning, *Television Economics* at 90 (1974).

there are reasons other than regulatory oversight to engage in this programming. The overall performance data contained herein convince us that the current and future video marketplace will continue to supply this type of issue-oriented programming in response to a basic market demand.[35] We note, however, that there may be individual stations that are not meeting the guidelines with respect to all of the programming categories. We do not believe that such an occurrence is inconsistent with the public interest since the overall data demonstrate that, on average, stations are performing well above the guidelines. It appears, therefore, that the failure of some stations to provide programming in some categories is being offset by the compensatory performance of other stations. In this respect, market demand is determining the appropriate mix of each licensee's programming. For example, a licensee may find it competitively appropriate to emphasize one type of programming within the guidelines rather than presenting programming in all categories. At the same time, other stations in the market may elect to present other types of programming. The net result of this shifting in the programming mix is that overall performance will exceed the guidelines even though individual stations are not presenting required amounts in all program categories.[36]

23. We believe that licensees should be given this flexibility to respond to the realities of the marketplace by allowing them to alter the mix of

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[35] The data presented above were based on the amounts of informational, local and non-entertainment programming. As noted in our radio deregulation proceeding, issue-responsive programming can include programming described under current definitions and can consist of, but is not limited to, public affairs, public service announcements, editorials, free speech messages, community bulletin boards and religious programming. *See Deregulation of Radio supra* n. 28 at 982-983. For example, the definition of public affairs programming may make this particular program category per se issue-responsive. *See* 47 C.F.R. §73.1810(d)(iv). We believe, therefore, that information relating to the current programming categories also provides a more than adequate data base on which to rest a predictive judgment that there will be a continued supply of issue-responsive programming. *See F.C.C. v. WNCN Listener's Guild, supra* at 594-595 (1981); *N.A.R.U.C. v. F.C.C. supra* at para. 8.; *Office of Communications of the United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1437 (D.C. Cir. 1983) (hereinafter *U.C.C. v. F.C.C.*); *N.A.A.C.P. v. F.C.C.*, 682 F.2d 993, 1001 (D.C. Cir. 1982); *M.C.I. Telecommunications Corporation v. F.C.C., supra* at para. 8 (predictive judgments of market developments are within the institutional competence of the Commission and are entitled to substantial judicial deference). While these categories provide an adequate data base, however, the concept of issue-responsive programming extends beyond the mere presentation of specified amounts of programming in discrete categories. *See* text, *infra* at para. 33.

[36] The *Notice* contained frequency distribution data indicating that some stations are performing below the guidelines. *See Notice* at 37253. These data do not necessarily suggest a market failure with respect to issue-responsive programming since they ignore the importance of market-based shifts in the programming mix.

their programming consistent with market demand. Such an approach not only permits more efficient competition among stations, but poses no real risk to the availability of these types of programming on a market basis. This is particularly true in view of the continuing obligation of all licensees to contribute issue-responsive programming and their responsibility to ensure that the strongly felt needs of all significant segments of their communities are met by market stations collectively.[37] The current guidelines, while failing to have a significant impact on overall station performance, tend to restrict the freedom of individual licensees by requiring them to present programming in all categories. Such a requirement is unnecessary and burdensome in light of overall market performance.[38]

24. Given these considerations, we believe that the existing guidelines are unnecessary. In addition, the record reveals that the existing regulatory structure imposes burdens on both licensees and the public. In light of the economic conclusions reached herein, we believe changes to that structure are warranted.

(b) Disadvantages of the Current Programming Guidelines.

25. At the outset, we note that to the extent current levels of programming exceed regulatory standards the guidelines are simply no longer necessary. In this respect, we note that the Court of Appeals has held that regulations, originally adopted to correct a specific problem, may be capricious if the underlying problem no longer exists.[39] Moreover, retaining the guidelines in light of our conclusions concerning marketplace incentives would be inconsistent with Congressional policies established in both the Regulatory Flexibility Act and the Paperwork Reduction Act.[40]

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[37] *Stone v. F.C.C.*, 466 F.2d 316 (D.C. Cir. 1972).

[38] A similar conclusion was reached in our radio deregulation proceeding. In radio deregulation, numerous outlets in each market had created the economic incentives to narrowcast to discrete audiences. We recognize that in this regard current video markets do not parallel the radio model. It is important to note, however, that the narrowcasting model is not a precondition to deregulation. For example, small radio markets were also deregulated even though they had not yet reached the narrowcasting model. We believe that in this regard the small radio market approach is analogous to the current video marketplace. Therefore, our decision herein, as in radio, turns on overall licensee performance in response to marketplace incentives. Thus, the existence of narrowcasting incentives is not necessarily related to the threshold decision to deregulate. The narrowcasting model, as opposed to broad-based programming incentives may, however, be relevant to a licensee's issue selection in the deregulated environment. *See Deregulation of Radio supra* n. 27 at 978; *see also* text, *infra* at para. 34.

[39] *See Home Box Office v. F.C.C.*, 567 F.2d 9, 48 (D.C. Cir. 1977).

[40] *Supra*, n.8.

26. Second, we note that the existing guidelines impose administrative costs on licensees. Although data from the previous analysis demonstrate that the existing programming amounts are largely a reflection of market forces rather than our guidelines, the compliance costs associated with these guidelines, with respect to formalized ascertainment and program logging requirements are not market dictated. The record here indicates that these costs are significant.[41] To the extent that these rules are not necessary to meet our regulatory objectives, we conclude that the costs incident to technical compliance and record keeping are inappropriate.

27. Third, we find that the present regulatory structure raises potential First Amendment concerns. Congress intended private broadcasting to develop with the widest journalistic freedom consistent with its public interest obligation.[42] Moreover, the public interest standard necessarily invites reference to First Amendment principles.[43] These concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach and licensee performance.[44]

28. To the extent that existing levels of programming are market-dictated, then it may be argued that the overall intrusive nature of the guidelines is not pervasive. This does not mean, however, that there is no current infringement on the editorial discretion of individual broadcasters.[45] For example, each licensee must still monitor its performance in light of this government-imposed standard. Further, the continued existence of the programming guidelines in the context of an evolving video services marketplace could conceivably constitute an unacceptable general level of infringement at some future time. In this regard, our action today provides a less intrusive means of meeting our regulatory objec-

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[41] *See* text, *infra*, at para. 51 for a complete discussion of the compliance costs associated with the formalized ascertainment and program logging requirements.

[42] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 914 (1973).

[43] *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

[44] *See U.C.C. v. F.C.C., supra* n. 33 at 1430 (quantity alone cannot be the measure of a licensee responsiveness); *National Black Media Coalition v. F.C.C.*, 589 F.2d 578, 581 (D.C. Cir. 1978) (hereinafter *N.B.M.C. v. F.C.C.*) (quantitative guidelines do not guarantee improved service).

[45] For example, a licensee that is currently presenting levels of programming at the limits of the guidelines may desire to alter its mix of non-entertainment programming. In this particular situation, our guidelines may infringe upon its editorial discretion by requiring it to present specified levels of non-entertainment programming that it would not otherwise air. *See* text, *supra* at para. 22 and n. 35.

tives.[46] Accordingly, we believe that our new regulatory approach is more consistent with underlying First Amendment values.

29. Our final concern with the present regulatory scheme focuses on the way in which it operationally defines a licensee's programming obligation in quantitative terms. The Commission's traditional policy objectives with respect to programming have never been fulfilled by the presentation of mere quantities of specific programming. On the contrary, the Commission has consistently sought to avoid this type of regulatory approach.[47] Moreover, the Courts have recognized that quantity, in and of itself, is not necessarily an accurate measure of the overall responsiveness of a licensee's programming.[48] Instead, a licensee's programming obligation has always been described in terms of providing programming that responds to the needs of the community.[49] Thus, the existing quantitative structure significantly misrepresents the nature of a broadcaster's underlying programming obligation by incorrectly suggesting that the broadcasting of specified quantities of programming is enough to fulfill their traditional programming responsibilities. By restating the programming obligation in uncontested renewal proceedings in terms of issue-responsive programming, we are providing broadcasters with a more appropriate description of their programming obligation.

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[46] In the delicate area of the First Amendment we have an affirmative obligation to examine our policies in light of the means used to obtain our objectives and whether other less restrictive mechanisms can achieve the same results. *United States v. O'Brien,* 391 U.S. 367, 377 (1968). *See also Home Box Office v. F.C.C. supra* n. 39 at 48 (incidental restrictions on First Amendment freedoms must be no greater than is essential to the furtherance of that interest).

[47] *Report and Order* in Docket No. 19142, (*In the Matter of Children's Programming and Advertising Practices*), 49 Fed. Reg. 1704 (January 13, 1984); *Notice of Proposed Rule Making* in BC Docket No. 81-496, (*Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting*), 87 F.C.C. 2d 716 (1982); *See also Commission Policy Concerning the Non-Commercial Nature of Educational Broadcast Stations,* 86 F.C.C. 2d 141 (1981), *recon. denied,* clarification and declaratory ruling granted, 90 F.C.C. 2d 895 (1982) (modification of over-the-air fundraising rules); *Report and Order* in BC Docket No. 78-335, (*Community Service Programming*), 82 F.C.C. 2d 130, 142 (1980); *Report and Order* in BC Docket No. 78-251, (*On the Airing of Public Service Announcements by Broadcast Licensees*), 81 F.C.C. 2d 346, 366 (1980); *Memorandum Opinion and Order* in Docket No. 20682, (*Changes in the Entertainment Formats of Broadcast Stations*), 60 F.C.C. 2d 858 (1976), *recon. denied,* 66 F.C.C. 2d 78 (1977), *rev'd WNCN Listeners Guild v. F.C.C.,* 610 F.2d 838 (D.C. Cir. 1979), *rev'd sub nom., F.C.C. v. WNCN, supra* at para. 8; *En Banc Programming Inquiry,* 44 F.C.C. 2303, 2314 (1960).

[48] *See U.C.C. v. F.C.C., supra,* n. 35 (quantity alone cannot be a measure of a licensee's responsiveness).

[49] For example, a station with programs addressing public issues and aired during high viewship time but amounting to only three percent of its weekly programming may be doing a superior job to a station airing six percent non-entertainment programming, little of which deals with community issues and which is broadcast when the audience is small.

30. In summary, our analysis of the record with respect to overall station performance and our re-evaluation of the problems inherent in the existing regulatory scheme lead us to the conclusion that the programming guidelines should be eliminated.[50] As a result, we no longer believe that the public interest requires an evaluation of programming in the processing of uncontested renewal applications.[51] Moreover, we note that remaining procedures are more than adequate to bring to our attention the failings of any particular licensee. As we have stated in numerous proceedings, citizen complaints and formal petitions to deny provide an important monitoring function in our regulatory endeavors. We believe these procedures will continue to provide us with important information relative to an individual licensee's compliance. We also note that we are not eliminating a licensee's obligation to provide programming that meets the needs of its community. We shall now turn to a more detailed discussion of this obligation in the context of the video marketplace.

4. Licensee's Obligations

31. While we conclude that the existing guidelines should be eliminated, we are not in this proceeding relieving a licensee of all programming responsibilities. As we noted in the radio deregulation proceeding, the Commission's involvement in the area of non-entertainment programming has always been driven by a concern that issues of importance to the community will be discovered and addressed in programming so that the informed public opinion, necessary in a functioning democracy, will be possible.[52] Given our conclusion with respect to existing economic incentives, however, we believe that our new regulatory approach should place greater emphasis on the role of the marketplace in achieving our regulatory objectives. In addition, deletion of quantitative guidelines as to programming responsibilities comports more closely with the Commission's programming concerns.

32. In light of these considerations, we believe that, in this context the only programming obligation of a licensee should be to provide programming responsive to issues of concern to its community of license. Accordingly, a commercial television broadcaster will remain subject to an obligation to provide programming that is responsive to the issues

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[50] *See Black Citizens for Fair Media v. F.C.C.*, 719 F. 2d 407 (D.C. Cir. 1983) *cert. denied*, (No. 83-1498, June 18, 1984) (Commission may infer compliance given that the inference is rebuttable and the regulatory environment provides strong incentives for operation in the public interest).

[51] *Greater Boston Television Corporation v. F.C.C.*, 44 F.2d 841, 852 (D.C. Cir. 1970) (agency's view of what is in the public interest may change without a change in circumstances as long as it has supplied reasoned analysis indicating that prior policies are being deliberately changed and not casually ignored.)

[52] *Deregulation of Radio supra* n. 28 at 977.

confronting its community. Moreover, licensees can be expected to demonstrate their compliance with this requirement by using the issues/programs list as discussed below.

33. A licensee, in the exercise of its good faith judgment, will be able to address issues by whatever program mix it believes is appropriate in order to be responsive to the needs of its community.[53] This includes, but is not limited to, programming described under current definitions of non-entertainment programming.[54] Moreover, licensees will also have the freedom to decide what amounts of such programming will be offered. Stations should continue to be guided by the needs of the community and their reasonable good faith discretion in selecting issues to be covered and appropriate programming responsive to those issues.

34. The significance of our new regulatory scheme lies not only in its impact on the programming behavior of licensees in today's video marketplace, but also in its flexibility in accommodating the natural economic incentives of the developing video marketplace. For example, as the number of video outlets increases, a television licensee may, in response to economic incentives, begin to direct its programming towards a narrower audience.[55] Unlike the existing guidelines, the new regulatory approach fosters this development by allowing the licensee to consider the programming of other television stations in its market in fulfilling its programming responsibilities.[56]

35. Having discussed the basic programming obligation being adopted by our action today, we believe it is appropriate to discuss the impact of this action within the contexts of uncontested renewals, petitions to deny

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[53] Of course, broadcasters cannot engage in intentional discrimination in the selection of issues to be addressed in their programming. *See Deregulation of Radio supra* at 978. *See also LaMar Life Broadcasting Co.*, 38 F.C.C. 1143, 1154-55 (1965), *rev'd and remanded on other grounds sub nom., Office of Communications of the United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966).

[54] We envision no departure from the definitions of issue responsive programming established in the radio deregulation proceeding. *See Memorandum Opinion and Order* in B.C. Docket No. 79-219, 87 F.C.C. 2d 797, 807 (1981). As in radio deregulation, such programming can consist of, by way of example and not limitation, public affairs, public service announcements, editorials, free speech messages, community bulletin boards and religious programming. *Deregulation of Radio supra* at 982-983. Indeed, programming in any of the categories contained in the *1960 Programming Statement* could be issue-responsive. *See U.C.C. v. F.C.C. supra.* We note, however, that generally, entertainment programming is not issue-responsive. *See Report and Order* in BC Docket No. 78-335 (*Community Service Programming*) *supra* n. 47 at 150.

[55] *See* Owen, Beebe & Manning, *Television Economics* at pp. 49-90 (1974).

[56] In this context, the term "television stations" includes both commercial and non-commercial television stations. We emphasize, however, that the existence of a non-commercial television station in a market does not obviate a licensee's obligation to provide programming that is responsive to issues facing the community. *See Deregulation of Radio supra* n. 28 at 1068.

and comparative proceedings. At the outset, we envision no significant change in petitions to deny or comparative proceedings.

36. *Renewal Standard.* In general, the basic renewal standard will continue to consist of an obligation that a licensee, during its prior license term, addressed community issues with responsive programming and complied with all other legal requirements. A licensee need only have addressed community issues with whatever types of programming, that in its reasonably exercised discretion, it determined was appropriate to those issues. With respect to uncontested applications, our determination in this proceeding permits us to make the renewal judgment called for by § 309 of the Communications Act of 1934, as amended, on a presumption of compliance with this standard.[57] Accordingly, we will no longer routinely review a licensee's programming in the uncontested renewal context.

37. *Petitions to Deny.* Individual licensees remain obligated to provide programming that is responsive to the community. Therefore, programming will remain a relevant issue in proceedings arising from petitions to deny. While overall programming remains a consideration in petitions to deny, eliminating the guidelines will affect the relevancy of certain types of programming issues. Since we are not concerned with the quantity of specified program categories, arguments based solely on the failure to present amounts of non-entertainment programming will not be appropriate.[58] Petitioners raising programming issues will have to demonstrate that an individual station is failing to address issues facing the community in its programming.[59] The focus of an allegation in this context should not be on the mere amount of programming presented. We have no wish to return to a simple quantitative approach. Moreover, we believe the obligation of a licensee in this context is to contribute to the overall information flow in its market. Thus, while this obligation is not

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[57] We note that current postcard renewal procedures do not require submission of programming data. Question 5 of the renewal short form, concerning compliance with the Commission's rules relative to the public inspection files, encompasses the obligation to provide issue-responsive programming. *See Report and Order* in BC Docket No. 80-253, (*Revision of Applications for Renewal of License of Commercial and Non-Commercial AM, FM, and Television Stations*). 46 Fed. Reg. 26236 (May 11, 1981). The existence of short form renewal procedures in a deregulated environment has received judicial approval. *See Black Citizens for Fair Media v. F.C.C., supra* n. 50 Elimination of the programming delegations, however, does call into question the continued need for current long form audit procedures for commercial television stations. *See* text *infra* at para. 80.

[58] The petition to deny procedure is governed by statute. *See* 47 U.S.C. §309(d). However, the types of issues which are considered relevant in this process are subject to change by the Commission. *Deregulation of Radio, supra* at 990.

[59] Petitions to deny must still contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest. 47 C.F.R. §73.3584(a).

negated by the existence of other issue-responsive programming in the market, it may be affected by the amounts and types of programming provided by other television broadcasters. The basic responsibility to contribute to the overall discussion of issues confronting the community is a non-delegable duty for which each licensee will be held individually accountable.

38. Similarly, petitioners may make allegations in a petition to deny that an individual station has failed to address issues of particular relevance to a significant segment of the community. Such a petition may be brought even in cases where a licensee has provided some issue-responsive programming.[60] We believe that a station confronted with this type of petition to deny should be able to respond by pointing not only to its own programming that may have addressed such issue, but also to other television stations available in the community that could reasonably have been relied upon to address such issues.[61] Of course, a licensee will not have to demonstrate that programming was available in the community in an amount proportional to the complaining group's representation of the community.[62] Since all individuals have general interests as well as special interests, we believe it is inappropriate to expect special interest programming to be proportional to special interest populations.

39. The focus of our inquiry in the petition to deny context can be expected to be whether the challenged licensee acted reasonably in choosing the issues it addressed in its programming. Assessing the reasonableness of a licensee's decision will necessitate an *ad hoc* review to examine the circumstances in which the programming decision was

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[60] *See Stone v. F.C.C., supra* n.37. *See also Alianza Federal de Mercedes v. F.C.C.*, 539 F.2d 736 (D.C. Cir. 1976), *Deregulation of Radio, supra* at 991.

[61] It is in this context that we believe our action today will serve to increase the number of issues placed on the public's agenda, thereby advancing the fundamental goal of diversity. Under existing regulations licensees cannot look to other stations in determining which issues to address. Allowing licensees to look to other television stations in determining which issues to address, coupled with the responsibility to contribute issue-responsive programming may increase the absolute number of issues receiving coverage on television. The Court of Appeals recognized the pro-diversity aspects of deregulation in reviewing the radio deregulation order.

> On this view, then, radio stations must specialize to prosper, and audiences benefit by the increased diversity of program offerings across the market - a benefit that offsets the loss of more diverse programming on any individual station. *U.C.C. v. F.C.C.* at 1434.

We believe this logic is applicable to the instant proceeding. However, we recognize that significant cross-market diversity benefits may not be fully realized until video markets mature and move towards a narrowcasting model.

[62] *See Stone v. F.C.C., supra.*

made.[63] The examination will focus on the licensee's evaluation of the programming of other television stations and its own responsive programming in light of the needs of its community. In any event, in the face of a petition to deny which makes a *prima facie* case that a licensee has been unreasonable, the burden will be upon the licensee to demonstrate that the exercise of discretion was appropriate in the circumstances. Of course, all other potential grounds for petitions to deny that are not affected by this proceeding will remain as valid grounds for such petitions.

40. *Comparative Proceedings.* We recognize that at the present time the Commission has before it a pending *Further Notice of Inquiry* in BC Docket No. 81-742, 47 Fed. Reg. 46117 (October 1982) concerning comparative renewal standards. Our action today in no way prejudges any issues raised in the context of that proceeding. Until these issues are resolved, however, we believe it is appropriate to discuss the impact this decision will have on the existing comparative process. As in radio, two crucial questions arise with regard to comparative proceedings. The first issue concerns whether elimination of the guidelines will adversely affect a licensee's legitimate renewal expectancy. The second, and more fundamental concern, is the way in which issue-responsive programming will be evaluated in the comparative context. In this regard, we note that this proceeding will not depart from current comparative evaluation with respect to non programming factors or in the current manner of evaluating other types of programming which do not fall within our new issue-responsive scheme.

41. The existing programming guidelines are utilized solely for the routine processing of *uncontested* renewal applications. Many commenters, however, expressed concern that elimination of the guidelines would impact adversely on a licensee's "legitimate renewal expectancy" in the comparative renewal context. As we concluded in the radio deregulation proceeding, there is no nexus between the programming guidelines and the granting of a renewal expectancy. In that context, compliance with the programming guidelines has never been utilized as a measure for determining substantial or minimal program performance. On the contrary, the fundamental inquiry in granting a comparative preference is whether the licensee has presented programming that addressed the issues facing its community. The Commission has consistently refrained from adopting quantitative standards in the comparative renewal context, preferring to review comparative hearings on an *ad hoc* basis.[64]

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[63] Such *ad hoc* evaluations have been made by the Commission in other areas. *See Fairness Doctrine Primer,* 40 F.C.C. 2d 598, 599 (1964), *Fairness Report,* 48 F.C.C. 2d 1, 9 (1974). *Deregulation of Radio supra* n. 28 at 992.

[64] *See Report and Order* in BC Docket No. 19154, 66 F.C.C. 2d 419 (1977) (terminating proceeding commenced in 1971 relative to adopting a quantitative standard for

42. We conclude that elimination of the programming guidelines will not affect existing programming considerations in either the competing new applicant or the comparative renewal contexts. The standards for evaluating competing new applicants are set out in the *1965 Policy Statement on Comparative Broadcast Hearings.*[65] While programming may be a consideration in these proceedings, it is but one of several elements that may be of decisional significance.[66] Moreover, programming issues are raised only where there are material and substantial differences between competing proposals.[67] When programming becomes an issue, however, the Commission's evaluation is not based on the mere compliance with quantitative criteria. Instead, the Commission determines which programming proposal would best meet the needs of the community. Accordingly, elimination of the programming guidelines will not affect the way in which programming is evaluated in the competing new applications process.

43. Apart from the criteria established in the 1965 *Policy Statement*, comparative renewal proceedings raise the issue of how much weight should be given to an incumbent's past programming performance.[68] The procedures for evaluating applications in the comparative renewal context were solidified in the Commission's *Cowles Broadcasting* decisions[69] In *Cowles*, the Commission concluded that an incumbent licensee could be granted a renewal expectancy for past meritorious service. The "expectancy" amounts to a comparative preference which is weighed against other factors such as diversification, integration and licensee misconduct.[70] The strength of the comparative preference depends on the merit

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determining substantial service). The decision not to adopt such a quantitative standard was upheld by the Court of Appeals. *N.B.M.C. v. F.C.C., supra* n.44.

[65] *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393 (1965).

[66] *Id.* The primary factors in the comparative analysis as defined in the *1965 Policy Statement,* are (1) diversification of control, and (2) best practicable service to the public. *Id.* at 394. The "best practicable service" rubric covers the integration of ownership with management, minority ownership, and the local residence, broadcast experience and civic activities of the owners. *Id.* at 395-99.

[67] *Id.* at 397, *See Johnston Broadcasting Co. v. F.C.C.,* 175 F.2d 351, 359 (D.C. Cir. 1949) (decisional significance accorded only to material and substantial differences between proposed program plans.)

[68] *See Policy Statement on Comparative Hearings Involving Regular Renewal Applicants,* 22 F.C.C. 2d 424 (1970). *rev'd Citizens Communications Center v. F.C.C.,* 447 F.2d 1201, 1214 (D.C. Cir. 1971); *Report and Order* in BC Docket No. 19154, 66 F.C.C. 2d 419, *aff'd N.B.M.C. v. F.C.C., supra.*

[69] *In re: Cowles Broadcasting Inc.,* 60 F.C.C. 2d 372 (1976) *recon. denied* and clarified 62 F.C.C. 2d 953 (1977), *recon. denied* 40 RR 2d 1627 (1977), vacated and remanded *sub nom. Central Florida Enterprises Inc. v. F.C.C.,* 598 F.2d 37 (D.C. Cir. 1978) *cert. denied,* 441 U.S. 957 (1979) on remand, *recon. denied* 86 F.C.C. 2d 993 (1981) *aff'd Central Florida Enterprises Inc. v. F.C.C.,* 683 F.2d 503 (D.C. Cir. 1982).

[70] *Cowles Broadcasting Inc.,* 86 F.C.C. 2d at 1012.

of the incumbent's past programming.[71]

44. Our action today allows a commercial television station licensee to consider the programming of the other television stations in its market when selecting its issue-responsive programming. Accordingly, an applicant's proposed programming or past programming performance may properly reflect such considerations.

B. Ascertainment

1. Background

45. Currently, applicants for television licenses, and those seeking renewal of existing licenses, are required to follow specific ascertainment procedures set forth in the *Primer*[72] and *Renewal Primer*.[73] Specific standards are established for determining the composition of the area to be served, consultation with community leaders and members of the general public, enumerating of community problems and needs, evaluation of the problems and needs, and relating proposed programming to the evaluated problems and needs. In addition, those seeking renewal must maintain an ongoing ascertainment process during their license terms, possess a community leader checklist, maintain information on the composition of the community in the public file, place documentation of ascertainment procedures in the station public inspection file, and annually file a list of not more than ten problems and needs of the station's service area along with a list of programs treating those problems and needs.

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[71] *See e.g. Deregulation of Radio supra* at 984: *Victor Broadcasting, Inc. v. F.C.C.* No. 82-1964, slip. op. (D.C. Cir. 1983). The generic questions of how the Commission should label and define that level of service that would give rise to a legitimate renewal expectancy are currently under examination in BC Docket No. 81-742, in response to a *Further Notice of Inquiry* in that proceeding. Some commenters suggested adoption of quantitative programming standards as either mandatory or voluntary benchmarks for measuring meritorious performance. Our action today in abolishing the numerical processing guidelines does not signify any predetermination of the issue of the desirability and/or necessity for quantitative standards to be applied for purposes of assessing a legitimate renewal expectancy in the context of a comparative challenge. Should the Commission be required to address these questions during the pendency of this proceeding, we shall consider them on a case-by-case basis. Of course, the Commission would take cognizance of the fact that licensees may consider the programming of other stations in the market as they select their own issue responsive programming.

[72] *Ascertainment of Community Problems*, 27 F.C.C. 2d 650 (1971).

[73] *First Report and Order* in Docket No. 19715 (*In the Matter of Ascertainment of Community Problems by Renewal Applicants*), 57 F.C.C. 2d 418, 441 (1975), *recon. granted in part*, 61 F.C.C. 2d 1 (1976).

2. Proposals

46. In the *Notice*, the Commission set forth two proposals relative to formal ascertainment requirements. Option I called for the elimination of formal ascertainment obligations. All references to ascertainment would be deleted from Commission rules and the *Primers* would be abolished. Option II called for the retention of an ascertainment requirement but would allow licensees to use any reasonable means to do so. The adequacy of a station's procedures would not be questioned absent a complaint that the licensee failed to meet its programming obligation.

3. Discussion

47. The Commission herein adopts Option I as set forth in the *Notice*. We believe that the public interest no longer requires adherence to ascertainment procedures. In conformance with the programming obligations set forth above, commercial television licensees, applicants for new television licenses, for the assignment or transfer of existing licenses or applicants for major modifications of existing facilities may determine the issues in their community that warrant consideration by whatever means they consider appropriate. The Commission will not request standardized documentation and submission of these efforts.

48. Ascertainment procedures were never intended to be an end in and of themselves. Rather, these procedures were intended as a means of ensuring that licensees actively discovered the problems, needs and issues facing their communities, thereby positively influencing the programming performance of stations by affecting the process of program decision-making. Yet, we have no evidence that these procedures have had such an effect.[74] Indeed, under existing requirements there is no guarantee that once a concern is ascertained by formal or informal means, programming responsive to that concern will be presented.[75] Moreover, we believe that licensees become and remain aware of the important issues and interests in their communities for reasons wholly independent of ascertainment requirements, and that our existing procedures are, therefore, neither necessary nor, in view of their significant costs, appropriate.

49. The current figures for non-entertainment programming categories show percentages far beyond those sought under the guidelines.[76] These figures indicate that non-entertainment programming is a financially important part of the broadcaster's revenue and that there are reasons other than regulatory oversight to engage in this programming. Commercial necessity dictates that the broadcaster must remain aware of the

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[74] *See Ascertainment of Community Problems by Renewal Applicants, supra* at 460 (dissent of Commissioner Robinson).

[75] *See Deregulation of Radio, supra* n.28 at 996.

[76] *See* paras. 10-15, *supra*.

issues of the community or run the risk of losing its audience. In short, present market forces provide adequate incentives for licensees to remain familiar with their communities. Moreover, future market forces, resulting from increased competition, will continue to require licensees to be aware of the needs of their communities. Given this commercial reality, we believe that the need for our ascertainment regulation has declined and will continue to decline, and that the Commission should eliminate it.[77]

50. We note in this regard that ascertainment is not mandated by the statute and is not an exclusive way to assure that licensees remain aware of their communities. Indeed, the Commission has recently relaxed ascertainment requirements in several areas. Ascertainment procedures are no longer required in the case of commercial radio,[78] or in the case of small markets,[79] and we are today eliminating ascertainment requirements for non-commercial stations.[80] In addition, the Commission has also refrained from imposing ascertainment requirements upon alternate video technologies.[81]

51. The costs of ascertainment are numerous. The Commission estimates that elimination of ascertainment requirements will result in annual savings of 66,956 work hours to the industry and 761.5 work hours to the Commission.[82] A study conducted by Michael O. Wirth found the annual mean cost of ascertainment for the licensee to be $6,574.[83] An informal survey conducted by NAB found the range of costs to be from

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[77] Such a determination is consistent with the purposes and intents of Congress to eliminate unnecessary government regulation. Regulatory Flexibility Act, Paperwork Reduction Act of 1980, *supra* n.8.

[78] *Second Report and Order* in BC Docket 79-219 (*Deregulation of Radio*), 49 Fed. Reg. 19019 (May 4, 1984).

[79] *Small Market Ascertainment Exemption*, 86 F.C.C. 2d 798 (1981) *aff'd sub. nom. National Black Media Coalition v. F.C.C.* 706 F.2d. 1224 (D.C. Cir. 1983).

[80] *Report and Order* in BC Docket No. 81-496 (*Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*), ____ F.C.C. 2d ____ (Adopted June 27, 1984).

[81] *Subscription Television Service*, 90 F.C.C. 2d 341, 358 (1982); *Report and Order* in BC Docket No. 78-253 (*Inquiry into Future Role of Low Power Broadcasting*) 47 Fed. Reg. 21468, 21491 (May 18, 1982); *Report and Order* in Gen Docket No. 80-603 (*Inquiry into Development of Regulatory Policy in regard to Direct Broadcast Satellites*), 90 F.C.C. 2d 676 (1982); *see generally* 47 C.F.R. Part 76, Cable Television Service.

[82] These figures, developed by the Mass Media Bureau for the Administrative Impact statement in this proceeding, assume that licensees will still ascertain community interests and concerns absent formal ascertainment procedures. Based on this assumption, the figures presented are 50 percent of the actual hour savings estimated by the Mass Media Bureau connected with the elimination of formal ascertainment procedures.

[83] The study, using 1979 data from 43 randomly selected stations, was presented to the Economics Division of the Western Social Service Association Annual Conference, Denver, Colorado (April 22, 1982) and entitled "Television and Radio Expenditure Behavior Under the Uncertainty of License Renewal." While the mean cost of ascertainment is found to be $6,574, the standard deviation related to cost is $7,370

$2,425 to $8,986.[84]

52. Other costs to the public, the licensee, and the Commission must be considered as well, such as the expense of litigation over the formalized requirements of ascertainment. The Commission has previously characterized its experience with ascertainment in the adversarial arena as "litigation over trivia."[85] As we observed in the *Notice*, the *Pike and Fisher Radio Regulation Digest* currently contains over sixty pages of ascertainment annotations, most relating to mechanistic aspects of the process.[86] Furthermore, ascertainment hearings unnecessarily delay service to the public. Even without actual litigation, it is clear that substantial resources are expended to make certain that a formalistic challenge is avoided.[87]

53. Finally, we find that to the extent the licensee is compelled to follow specific procedures, resources are diverted and the opportunity for licensee discretion is foreclosed. The resources which the licensee is forced to expend to satisfy procedural requirements are lost from other potentially beneficial activities, such as program production in response to determined needs.[88]

4. Conclusion

54. We do not believe that the benefits of the ascertainment requirements justify the costs of this procedure. While ascertainment does provide the licensee with knowledge of the community, it is clearly not the exclusive means of acquiring this knowledge, and is certainly not the most efficient. Licensees, like other citizens, are exposed to newspapers, newsletters, town meetings and other community activities, all of which provide indications of those issues that are important to the community. Broadcasters do not operate in a vacuum and, as discussed above, it is in

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signifying that the costs of ascertainment are quite varied. 68 percent of these surveyed have costs of ascertainment between 0 and $13,944.

[84] These figures, included in the NAB comment to this proceeding, are the result of a telephone survey conducted in 3 television markets in October, 1983. The average station in the top 50 market surveyed estimated it would spend 27 percent less money and 29 percent less time absent formal procedures. The average station in the 51-100 market estimated savings at 25 percent less money and 18 percent less time while the average for the 101+ market was 29 percent less money and 23 percent less time absent formal procedures.

[85] *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 382-383 (1981).

[86] *Notice* at 37247.

[87] Counsel must be consulted to assure that formalities have been satisfied. Many of the commenters noted that a major savings from the elimination of formal ascertainment would be a reduction in attorney's fees.

[88] Many of those questioned in the informal NAB survey noted they would continue an "ascertainment" procedure but foresaw significant savings in the efficiencies they could realize absent formal requirements.

the economic best interest of the licensee to stay informed about the needs and interests of its community. Given these considerations, as well as the continuing obligation of all licensees to provide issue-responsive programming, we believe that ascertainment requirements can now be abandoned with little or no risk of adverse effects on the programming performance of television licensees.[89] Accordingly, in all future proceedings, the focus of our inquiry shall be upon the responsiveness of a licensee's programming, not the methodology utilized to arrive at those programming decisions. If the programming presented by the licensee satisfies its obligation, the ascertainment efforts of the station are irrelevant.

C. Commercial Guidelines

1. Background

55. The Commission's concern with commercial practices has been shaped by two primary considerations: the desire to prevent the abuse of scarce broadcast resources through excessive commercialization, and a reluctance to adopt rigid quantitative standards.[90] As the *Notice* observed, our regulation of commercial practices has been characterized by the concern that licensees avoid abuses with respect to the total amount of time devoted to advertising as well as the frequency with which programming is interrupted for commercial messages.[91] In our 1973 *Order* (*Amendments to Delegations of Authority*),[92] we adopted the 16 minute commercial guideline at issue herein. It was our intention in adopting a guideline rather than a rule, that licensees be given some flexibility in fulfilling their public interest responsibility as it relates to commercialization. However, it has been suggested that given the penalty for exceeding the guideline, it has the practical effect of a rule. In

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[89] We note as well that licensees remain obliged to ensure the market availability of programming addressing the strongly felt needs of significant segments of their communities. *See Stone v. F.C.C., supra* n.37.

[90] The *Notice* cited the following examples of Commission consideration and rejection of proposals to adopt quantified commercial requirements: *Notice of Proposed Rule Making,* 28 Fed. Reg. 5158 (May 23, 1963) (looked toward the adoption of rigid commercial standards but chose not to adopt such standards); *Commercial Advertising Standards,* 36 F.C.C. 45 (1964) (refused to initiate rule making regarding overcommercialization citing lack of public reaction and possible First Amendment problems); *TV Overcommercialization* 49 RR 2d 391 (1981) (concluding that best form of regulation was self-imposed voluntary restraint).

[91] *Report and Statement of Policy Re: Commission en banc Programming Inquiry,* 44 F.C.C. 2303 (1960):

> With respect to advertising material, the licensee has the additional responsibility . . . to avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages.

[92] 43 F.C.C. 2d 638 (1973).

addition, the evidence demonstrates that levels of commercialization have remained significantly below the 16 minute ceiling imposed by the guideline.

2. Proposals

56. The commercial standard at issue herein is contained in Section 0.283(a)(7) of our rules. Under this rule, the authority to review proposed levels of commercialization in new applications, renewals or transfers, is delegated to the Mass Media Bureau, except in the case of

> [c]ommercial TV applicants for a new station, or assignment or transfer, or renewal of license, proposing to exceed 16 minutes of commercial matter per hour, or during periods of high demand for political advertising, providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 percent or more of the station's total weekly hours of operation.

Those applications which propose to exceed this guideline must be reviewed by the Commission.

57. In the *Notice*, we proposed two specific options for modifying this procedure as well as a general statutory model. We sought comments on these proposals and invited commenters to offer alternatives. The three options proposed in the *Notice* were:

1) The elimination of all rules and policies restricting the amount of commercial time and reliance on marketplace forces to regulate levels of commercialization;

2) the amendment of the commercial time restrictions to give broadcasters more discretion and encourage experimentation but retention of some oversight authority; and

3) the general statutory model recommending reliance solely upon whatever applicable requirements were explicitly contained in the Act.

Comments submitted expressed preferences all along this regulatory continuum.

3. Discussion

58. The record in this proceeding provides convincing evidence that marketplace forces can better determine appropriate commercial levels than our own rules. In addition, such reliance provides a significantly less intrusive and less expensive alternative than our current regulatory scheme. Based on our decision today, the above-noted commercial guideline is herein eliminated. The Commission will no longer consider levels of commercialization in the processing of license applications. Furthermore, we will no longer entertain petitions to deny based on allegations of overcommercialization. Finally, we will rescind our policy banning program length commercials.[93]

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[93] Similar action was approved by the Court of Appeals for the D.C. Circuit in the radio deregulation proceeding. "[T]he Commission acted well within its discretion by concluding from the record and its own experience that it is the marketplace and not regulation

(a) Market Incentives

59. The *Notice* in this proceeding included an analysis of the number of commercial minutes aired on commercial television stations in three states during a recent license renewal period.[94] The data showed that network affiliates averaged 10.87 minutes of commercial matter per hour when the entire broadcast day was considered.[95] The *Notice* also found that 99.67 percent of all broadcast hours studied were within the guideline. A study proffered by NAB in its comments submitted in this proceeding also found commercialization levels significantly below the guideline.[96] Using a sample of 166 VHF stations (136 network affiliates and 30 independents), NAB found that network affiliates averaged 10.4 minutes of commercials per hour while independents averaged 9.6, for an overall average of 10.3 commercial minutes per hour. In either case, the data convincingly demonstrate that marketplace forces, and not the guideline, are the decisive factor in determining appropriate levels of commercialization for commercial television stations.

(b) Burdens of Existing Regulation

60. Based on the foregoing evidence, we can no longer continue to justify either the direct costs imposed by adherence to the commercial guideline - the paperwork burden of record keeping, reviewing and monitoring - or its more indirect costs such as possible anti-competitive effects or stifling commercial experimentation and intrusion into the realm of commercial speech protected by the First Amendment.

61. The direct burdens imposed by the guideline are straightforward and do not require further illumination herein. However, we believe that closer examination of the indirect costs of our guideline will help to clarify our actions today.

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that has kept down the level of commercialization. The Commission hypothesized that since audiences avoid radio with excessive advertising, those stations would become less attractive to advertisers, and therefore, would lose advertising revenue. Thus, at present and in the future, a self-regulating market mechanism will prevent overcommercialization. In the absence of any statutory mandate obligating the Commission to maintain these processing guidelines, this court must give substantial deference to such policy judgments and predictions of future industry behavior." *U.C.C. v. F.C.C., supra* n.35 at 1438.

[94] *See Notice, supra* n.1 at 37254-55, Appendix C.

[95] The *Notice* also cited a less exact estimation of 13.5 commercial minutes obtained per hour of network programming, by simply adding the network and local commercial averages. However, this figure fails to account for variations in the amount of commercial time throughout the broadcast day. The above-noted average of 10.87 is more statistically accurate because it is calculated by adding the average number of local commercial minutes aired by an affiliate per day to the average number of network commercial minutes and then dividing by the daily average number of broadcast hours.

[96] The NAB study, cited in Appendix C of its comments, covers the period from 1978 to 1983.

62. *Competitive Effect.* A significant danger posed by our commercial guideline is that it may impede the ability of commercial television stations to present innovative and detailed commercials. In addition to creating a potential disadvantage to video and non-video services currently in operation, our regulation may also interfere with the natural growth and development of broadcast television as it attempts to compete with future video market entrants. We believe that this risk can no longer be justified in view of our conclusion that the desired result is produced by primary reliance on marketplace forces.

63. *First Amendment Concerns.* In addition to potential anti-competitive effects, we are concerned about becoming involved in the regulation of program content and of the attendant potential chilling effect on commercial speech which the guideline might exert. The Supreme Court has granted significant First Amendment protection to commercial speech.[97] Moreover, the continued existence of very broad governmental regulations is inconsistent with the Supreme Court's mandate in *United States v. O'Brien* that regulation in constitutionally sensitive areas use the least restrictive means suitable to achieving its legitimate ends 391 U.S. at 377 (1978).[98] The record in this proceeding, including the data and economic analysis performed herein, demonstrates that marketplace forces should effectively regulate commercial excesses. That evidence, in addition to the absence of any indication that elimination will otherwise harm the public interest, provides sufficient cause to eliminate the commercial guideline.

(c) Other Considerations

64. The empirical data presented in the *Notice* demonstrate to our satisfaction that commercial levels will be more effectively regulated by audience selection and market forces than by the guideline. The data presented by NAB in its comments in this proceeding corroborate this finding. However, several commenters suggest that because most of these data were collected while the NAB Code was still in force, its results might be misleading. While this suggestion of possible basis must be considered, we note that not all television stations subscribed to the Code and that those subscribing were not subject to vigorous NAB enforcement. However, the relevant data are sufficiently dramatic to demonstrate that the levels of advertising are not dependant on the NAB Code or Commission guidelines. Thus, it is our conclusion, based on the extent to which actual performance fell below the guideline, that it is competi-

[97] *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. State Board of Arizona*, 433 U.S. 350 (1976); and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[98] *See also Home Box Office, Inc. v. F.C.C., supra* n.39 at 48.

tion, not enforcement of the guidelines or the NAB Code, that most effectively regulates current levels of commercialization.

65. Another concern raised by commenters in this proceeding was that elimination of the guideline might increase commercial "clutter" - the number of consecutive advertisements in each commercial break. Currently the Commission does not regulate this aspect of commercialization. However, it is our opinion that eliminating the guideline will not significantly change the behavior of licensees in this area. We believe that (1) audiences are likely to avoid stations with excessive clutter, thus making those stations less attractive to advertisers; and (2) advertisers are likely to avoid such stations because their advertisements are less effective within the clutter of other commercial matter.

66. Finally, several commenters objected that market forces will not be adequate to control overcommercialization because of the fractured economic relationship between the licensee and its audience. Suggesting that licensees in fact market their product primarily to advertisers rather than audiences, these parties suggested that elimination of the guideline would increase commercial loading and ultimately result in greater advertiser control over programming. As noted, however, the record does not support the assumption that elimination of the guidelines will lead to increased commercial loading. Moreover, to the extent the concerns raised by these commenters are directed to the fundamental, advertiser supported nature of commercial television, we would readily concede that the advertiser supported nature of the medium has some effect on program content. Again, however, there is no concrete evidence that elimination of the commercial guideline will lead to an increase in the programming power of advertisers to the detriment of the public interest.

4. Conclusion

67. By our action today, the current commercial guideline is eliminated. It is our intention that this change promote licensee experimentation and otherwise increase commercial flexibility. We are taking this step because we are convinced that commercial levels will be effectively regulated by marketplace forces and because we do not believe that elimination of the guideline will otherwise harm the public interest. In sum, it seems clear to us that if stations exceed the tolerance level of viewers by adding "too many" commercials the market will regulate itself, *i.e.*, the viewers will not watch and the advertisers will not buy time.[99]

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[99] We note that our action today does not prejudge the issues raised in the complaint filed by Action for Children's Television, *See, e.g., In the Matter of Continental Broadcasting Network, Inc. (WXNE-TV Boston) et al.* (filed October 11, 1983), the complaint filed by The National Association for Better Broadcasting against *KCOP-TV* Los Angeles (filed April 5, 1984) and other related pleadings.

D. Program Logs

1. Background

68. Since the beginning of broadcast regulation, some type of program logging requirements have existed. Under present rules, the Commission requires television broadcasters to maintain a contemporaneous listing of all programs broadcast.[100] The program type and source must also be set forth. Program logs must be maintained for a period of two years.[101] Television licensees are required to make these logs available for public inspection if the requester of the information meets certain procedural safeguards.[102] Although, a copy of the program logs for a composite week ar to be submitted to the Commission by those renewal applicants selected to complete the long form audit, as a general matter, the logs are not to be filed with this agency.[103] When filed, the logs are perused by the Commission to determine whether the licensee has programmed in accordance with the promises made in its previous license application.

2. Proposals

69. As mentioned in the *Notice*, according to a 1978 GAO report, the Commission's logging requirements constituted the largest government burden on business in terms of total burden hours.[104] According to calculations made by Commission staff, previously indicated in the *Notice*, the burden imposed on commercial television licensees by our program log requirements exceeds 2,468,000 hours per year.[105] Because the Commission's actual utilization of the program logs is minimal, and therefore we felt the burdens imposed by our present requirements might not be justified, their elimination was proposed. In addition, since our program logging requirements are intended as documentation of a licensee's programming and commercialization practices, if these policies are amended or eliminated, retaining the present logging requirements might be unnecessary.

70. We were mindful in the *Notice* that in the radio deregulation case, the Court of Appeals questioned the Commission's action eliminating the

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[100] *Amendment of Program Logging Rules for Television Broadcast Stations*, 5 F.C.C. 2d 185 (1966).

[101] *See* Section 73.1840 of the Commission's Rules.

[102] *Program Logs*, 44 F.C.C. 2d 845 (1974), *recon. denied*, 45 F.C.C. 2d 781 (1974).

[103] For the Commission's adoption of a streamlined and simplified license renewal procedure, *See Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, 49 RR 2d 740, (1981) *recon. denied*, 50 RR 2d 704 (1981), *aff'd sub nom. Black Citizens for a Fair Media v. F.C.C.*, *supra* n.50.

[104] GAO, *Federal Paperwork: Its Impact on American Business*, pp. 43-44 (1978).

[105] There is no less reason for that number to have changed since its original calculation, less than a year ago.

program log requirements and replacing them with an issues/programs list.[106] Although upholding the Commission's action deleting guidelines regarding non-entertainment programming and commercial levels and eliminating community ascertainment requirements for commercial radio stations, the court inquired into whether a revised log would be a more appropriate mechanism than the issues/programs list for meeting the informational needs of the Commission and the public. The court asked whether, in view of the new regulatory scheme for radio, this annual list could provide a sufficient gauge of a station's overall public service performance. Therefore, we proposed in the *Notice* in the instant proceeding to explore those options raised by us on remand in the radio deregulation proceeding. In the radio deregulation *Second Report and Order, supra* n. 78, the Commission resolved to retain the issues/programs list obligation. However, it modified this duty in two respects. First, it eliminated the limitation that no more than 10 issues be listed. Second, the Commission required that these lists be prepared and made available quarterly rather than annually.[107] Commenters in the instant case were also invited to address the question whether a revised program logging rule by itself would satisfactorily meet the Commission's information collection requirements. In raising these questions for comment, we cautioned the parties to keep in mind the Commission's goal of carefully tailoring any reporting or logging rules to assure the collection of truly needed information while minimizing the burdens imposed on those submitting the information.

3. Discussion

71. After carefully reviewing the record in this proceeding, we have concluded that the best method of documentation suitable and adequate to our new regulatory scheme for television broadcasting is a quarterly issues/programs list requirement.[108] This list is to be placed in a station's public inspection file and it should contain, in narrative form, a brief

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[106] *U.C.C. v. F.C.C., supra* n.41.

[107] In the *Further Notice of Proposed Rule Making* in BC Docket No. 79-219, 48 Fed. Reg. 33499 (July 22, 1983), we stated that our tentatively preferred reporting option involved an exemplary annual issues/programs list with from five to ten issues of concern to the community plus some form of log specifying the date, time, duration and issue addressed for all those programs aired that are responsive to community issues. We also indicated that the issues/programs list alone might be sufficient to oversee and implement our newly instituted policies.

[108] By the action taken herein, we no longer require a commercial television broadcaster to place a "problems-programs" list in its public inspection file. Specifically, this yearly listing was to contain no more than ten significant problems and needs of the area served by the station during the preceding 12 months. In relation to each problem cited, licensees were to indicate and describe illustrative programs which were broadcast in response to those problems. See §73.3526(a)(9).

description of at least five to ten issues to which the licensee gave particular attention with programming in the past three months with a statement of how each issue was treated.[109] The list also is to include information pertaining to the date and time of broadcast and the duration of listed programming. While this list is intended to be exemplary in nature, quarterly submissions should provide a sufficient record for making a public interest evaluation.

72. In evaluating the merits of the various options proposed, we have focused on the costs to be imposed on commercial television licensees and the benefits to be gleaned by the public and the Commission. Although an annual issues/programs list minimally burdens broadcasters, it is unclear that it provides adequate information for the Commission and the public to judge a station's overall public service performance. On the other hand, the proposed comprehensive log would significantly burden broadcasters and yet may not provide the most useful information to evaluate a station's public interest programming. *See* para. 76, *infra.*

73. As to costs of logging, commenters in this proceeding asserted that logs containing information relevant to the new regulatory scheme would require involvement of management level staff and therefore would be substantially more costly and burdensome than the simple traditional logs, which can be maintained by clerical staff. We have no cause to question these assertions, and they seem reasonable. The issue, therefore, is whether there is clear need under our new regulatory scheme for logging which is substantially more costly and burdensome than that presently required.

74. As noted by the court in the radio deregulation proceeding, the Communications Act does not compel the Commission to retain the programming log requirements. We are no longer interested in amounts of programming in categories such as "news" and "public affairs" because we have eliminated programming guidelines. Furthermore, we have eliminated commercial guidelines which could require the maintenance of logs for substantiation. Therefore, we see no need to require documentation of non-entertainment programming other than issue-responsive programming. Thus, retaining the present logging obligations

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[109] In *Deregulation of Radio*, we required licensees to describe how they determined the issues to be ones facing their communities. In reviewing the adequacy of the commercial radio issues/programs list in the *Second Report and Order*, we concluded that this particular aspect of the obligation conflicted with our prior decision that the methodology utilized by licensees to become aware of the issues facing their community is not of concern to us. This is true as well in the instant proceeding. Consequently, we will not require television broadcasters to describe and explain the means by which they ascertain each issue to be one facing their community. The burden incident to such a requirement is not warranted, for it is programming and not the process of ascertaining community issues that is of interest to us.

no longer serves any regulatory purpose. We have found that marketplace forces at work today will elicit adequate amounts of non-entertainment programming, without regulatory intervention. If at some time in the future, there is significant market failure with respect to such programming, we are certain this will be brought to our attention by such means as audience complaints. Having been alerted to any problem which arises, we can document its scope by any of several means, such as special studies, investigations and temporary logging requirements and take whatever regulatory action is needed. We do not believe that to guard against the mere possibility that at some future time adequate amounts of non-entertainment programming may not be broadcast, we should now impose a costly general logging requirement on our licensees.

75. The Court of Appeals found it reasonable to conclude that a logging requirement designed to make available certain information relevant under one regulatory scheme might be useless if transplanted urchanged to a new regulatory scheme. We have considered the court's suggestion, made in the context of the radio deregulation proceeding, that a revised log might be a more appropriate mechanism than the issues/programs list for meeting the informational needs of the Commission and the public. However, we believe that the issues/programs list technique is best equipped to elicit the kind of purposeful programming information relevant to our current regulatory concerns. A logging requirement might be devised which could be useful in monitoring licensees' fulfillment of their programming obligation.[110] However, we believe the better alternative source of information for this purpose is the issues/programs list. The new regulatory scheme imposes a basic issue-responsive programming responsibility on commercial television licensees. An issues/programs list is a more useful vehicle to record a licensee's effort in this regard. An exhaustive log, perhaps necessary under the old regulatory requirements, is not needed to document the current program obligation which is directed to issues of concern to the community rather than to categories or amounts of programs.

76. The most significant source of issue-responsive information under the new regulatory scheme will be the issues/programs list. These lists will certainly contain more relevant information than traditional logs, which usually do not identify issues and issue-responsive programming. Since we are not limiting the number of issues on these lists, we anticipate that broadcasters will probably use them to adequately document their

[110] We are aware that the system of record keeping adopted herein will require the involvement of management-level personnel. While this may appear, in some respects, to be more burdensome than a rote logging requirement, the adoption of a quarterly issues/programs list will reduce the actual time devoted by licensees to record keeping by more than 1.9 million work hours.

significant issue-responsive programming, because doing so will serve their own self interest.

77. In the context of a routine license renewal, the existence of the issues/programs list in the station's public file will give the Commission sufficient assurance that the station has met its issue-responsive programming responsibility during the past license term to grant license renewal on that issue. In other contexts, such as when a programming issue is raised in a petition to deny or in a comparative renewal, these lists will serve as a significant source of information for any initial investigation by a member of the public or by the Commission. If in a particular case, a station's issues/programs lists do not provide sufficient information to resolve a substantial question of fact, the Commission may ask, as it has in the past, for more information from the licensee. In a contested license renewal the burden of proving that programming relevant to public issues has been provided is on the licensee. A broadcaster must demonstrate, if called on to do so, in a hearing or otherwise, that it has met its responsibility in this regard.

78. Another source of information regarding the performance of our television licensees is the public. We note that programming logs have in the past been one source relied on by petitioners to deny renewal of existing licenses. We also note, however, that petitions to deny have been and can be expected to continue to be documented by other means. For example, petitioners can begin by consulting the published newspaper or magazine entertainment guides which give detailed lists of individual station offerings and often include brief summaries of program topics. In addition, petitioners to deny can provide their own documentation by monitoring the service of the station. Any need for such monitoring would of course impose some burden on petitioners, but it would only be that of supplementing, in a particular case, the documentation available in the issues/programs lists of the station in question and others in its market. When such supplemental documentation is needed and supplied, it should be a helpful indicator of any need for reassessment of our new regulatory scheme. However, if experience in the future indicates that the public interest would be served by easing the documentation burdens of petitioners to deny at the cost of imposing logging requirements on television licensees, we can revisit this issue.

4. Conclusion

79. In sum, we believe that a quarterly requirement, with no limitation on the number of issues addressed,[111] will ensure that availability of an

[111] Some community issues may be of such significance that they are repeated on subsequent issues/programs lists. Such a decision is left to the licensee's discretion and open to public and Commission scrutiny in their judgment on the broadcaster's good

information base sufficiently broad to prevent misjudgments due to a limited sample size or overly narrow selection by licensees in preparing an annual list. The quarterly, no limit issues/programs list is capable not only of providing data needed to evaluate a licensee's individual performance but can be utilized to monitor the effect of the action taken earlier in this document deregulating the commercial television broadcast service. We believe this approach is the best means of meeting our information needs while minimizing the recordkeeping burdens on licensees.

E. Long Form Audit

80. In our *Notice* we stated that in proposing to revise the regulatory scheme for television licensees it was also appropriate to reconsider the information needs of the Commission.[112] The burdens imposed by our present requirements may be viewed as overly burdensome. One such information requirement is the random long form renewal audit of commercial television licensees, eliminated for commercial radio stations but maintained for a random five percent of commercial television stations.[113] The long form audit was preserved in television to assure that the licensees would conform with current requirements and more significantly because no regulatory revision had occurred in television as it had in radio.

81. In the case of radio we determined that significant changes had occurred in the radio marketplace such that detailed regulation of non-entertainment programming, ascertainment, commercialization, and program logging requirements was no longer needed to preserve the generalized obligations of stations to operate in the public interest. Since these guidelines had been eliminated in the case of commercial radio, we determined that a long form audit would serve no purpose and would in fact dilute the intended effect and impact of the radio deregulation proceeding.[114]

82. In the present proceeding we have similarly reviewed our information requirements in commercial television. We have determined that the current and future video marketplace will provide sufficient incentives. Detailed regulation related to non-entertainment programming guidelines, ascertainment, commercial guidelines, and program logging are no longer required. A simplification of procedures in these areas still

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faith efforts to program to meet community issues. We also note that responsive programming may consist of numerous and diverse broadcasts in answer to any one issue.

[112] *Notice, supra* n.1 at 37248.

[113] *Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial AM, FM, and Television Licensees,* 46 Fed. Reg. 26236 (May 11, 1981).

[114] *Id.* at 26241.

provides us with adequate information to make a determination whether a licensee is in violation of any statutory requirements. As in radio, we believe that absent regulations in these areas a long form audit will serve no useful purpose.[115] Therefore, the long form audit is hereafter eliminated for commercial television licensees.

83. The Commission will continue to conduct random FOB technical inspections and check the public inspection files of commercial television licensees for completeness. Elimination of the long form audit does not alter the substantive obligation of commercial television licensees to serve the public interest. While the short form renewal application carries with it a presumption of service in the public interest, the presumption is rebuttable by responses which indicate statutory or regulatory violations. Petitions to deny or complaints alleging violations could also serve to rebut a presumption carried by the short form renewal application.[116]

F. Administration of Deregulation

84. The policies enunciated herein, along with the relevant rule changes set forth in Appendix A, will become effective thirty days from the publication of this document in the Federal Register. After the effective date of these policies, application for new stations, as well as application for the assignment, transfer, renewal and/or modification of existing stations, will be modified by subsequent Commission action, in accordance with the provisions of this *Report and Order*, and all such applicants will be required to file only the information requested herein.

1. New Applications

85. Because the policies enunciated herein will affect the future operation of commercial television broadcast stations, we believe that they should also be applied to applications filed before the effective date of this *Report and Order* but still before the Commission for consideration.[117] Therefore, upon the effective date of this *Report and Order*, those portions of applications for new facilities which have been obviated

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[115] Form 303-C also inquires into television network affiliation agreements. This information is duplicative. Reporting of these agreements is separately compelled by Section 73.3613 of the Commission's rules. It is part of the ownership report (FCC Form 323 or 323-E) which still must be filed and is unaffected by this proceeding.

[116] With the elimination of Form 303-C, licensees will no longer be required to present a separate list of programs designated for children 12 years or under. Our action in this regard, however, in no way changes licensees' programming obligations with respect to children. It is part of the licensee's general public interest obligation to examine the program needs of children and to be ready to demonstrate its attention to those needs. *See In the Matter of Children's Programming and Advertising Practices*, 49 Fed. Reg. 1704 (January 13, 1984).

[117] These procedures cover application for new facilities, applications for modifications of existing facilities and the buyer's portions of applications for assignment or transfer of existing stations.

by this action will be considered immaterial to the Commission's determination of that application. We will not physically return those portions of the applications, and it will not be necessary for applicants to file amendments to conform with the revised wording of the applicable form. For example, the ascertainment and programming portions of applications already on file should adequately respond to the revised questions. If additional information is needed, especially with regard to proposed programming, the Commission's staff will contact the applicant. Thus, modifications of applications already on file will not be necessary.

86. We further believe that when these policies become effective they should apply to pending applications for new facilities that have been designated for hearing or are in any further stage of the hearing process. Therefore, if issues which are obviated by this action have been specified and/or tried, Administrative Law Judges and the Review Board are directed to resolve those issues in accordance with the policies enunciated herein. Thus, the issues should be deleted in either an interlocutory order or in the decision, as appropriate. In directing this course we wish to emphasize no intention to foreclose consideration of related issues not directly affected herein. Thus, issues concerning *alleged* misrepresentations relating to ascertainment will not be extinguished. However, there would be no need to resolve issues on the sufficiency of ascertainment based upon alleged failures to follow the steps detailed in the *Primer.*

2. Renewal Applications

87. The administration of these policies to renewal applications is complicated by the fact that such applications encompass both the licensee's past performance and proposals for the future. Certainly, the portions of renewal applications which relate to future proposals should be treated in the same manner as new applications. Accordingly, the procedures and directions set forth above will govern the consideration of the prospective portions of renewal applications.[118]

88. The retrospective portions of renewal applications and the seller's portion of assignment and transfer applications relate to conduct during the time when the licensee was expected to adhere to rules and policies which have been eliminated herein. It is not our intention to relieve licensees of those obligations after the fact. On the other hand, we do not believe it would be reasonable to continue to require licensees to file information on the diminishing portion of the past license term which was governed by the old policies. Accordingly, we will continue to require the filing of, and we will consider, the retrospective portions of renewal applications until the effective date of the *Report and Order.* Thereafter, licensees will file renewal applications in accordance with the reformed

[118] This will also apply to the buyer's portion of assignment and transfer applications.

application to best set forth in further action by the Commission in accordance with the provisions of this *Report and Order*. Thus, although we will not require routine filing of materials related to past ascertainment, commercialization or programming performance, these issues could be raised in a petition to deny or on the Commission's own motion. This is the case because violations of a past regulation at the time when it was in effect may be relevant to a licensee's qualifications to retain its license, even if the subject regulation was modified or eliminated in this proceeding.

III. Conclusion

89. Our action today constitutes a significant step in the deregulation of commercial television. It is predicated on the recognition that marketplace dynamics, not our regulations, are the primary determinants of licensee performance with respect to programming, commercialization and ascertainment. In light of these conclusions, we have re-examined the current regulatory scheme and conclude that it imposes unnecessary burdens on both licensees and the public. We believe that the new regulatory approach adopted here, will provide licensees with the flexibility necessary to respond to the needs and demands of their communities.

90. We feel confident that existing and future marketplace forces will ensure the presentation of programming that addresses significant issues in the community. Moreover, the record keeping requirements adopted here will provide us with the information necessary to monitor the performance of our new regulatory scheme. In addition, there are other formal and informal procedures readily available to bring specific problems to our attention. Accordingly, we believe that the existing regulatory scheme is no longer necessary to assure operation in the public interest.

Regulatory Flexibility Analysis

I. Need for and Purpose of Rule

91. The Commission has concluded that the programming and commercialization guidelines and the ascertainment and logging requirements imposed on commercial television stations burden both the broadcasters and the Commission without any commensurate benefits. The proposed elimination of these various requirements will enable broadcasters to satisfy their fundamental obligations with greater alacrity. We have also concluded that existing and potential marketplace forces can satisfactorily govern these areas.

II. Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues Raised

92. In regard to programming guidelines, many of those commenting questioned whether non-entertainment programming levels would remain high absent the existence of minimum guidelines. Similar issues were raised regarding commercialization and ascertainment. Absent guidelines would commercialization increase and would ascertainment continue absent the specific procedures called for in the *Primerf0. In the area of logs, many commenters questioned whether adequate information would be provided to the Commission and the public, absent present logging requirements.*

Assessment:

93. The Commission concludes that the arguments supporting the relaxation of programming and commercialization policies and ascertainment and program log requirements pertaining to commercial television stations are persuasive.

94. We conclude that current and future marketplace forces can govern these matters satisfactorily. Additionally, by eliminating these formalistic requirements commercial broadcasters may be able to provide more efficient service to their communities of license.

Changes made as a result of such comment:

95. Responding to comments, we now eliminate our guidelines relating to programming and commercialization, our formal ascertainment requirements, and relax our program log requirements.

Significant alternatives considered and rejected:

96. In addition to allowing commercial television stations to make their own decisions in the areas of commercialization, programming and ascertainment, the *Notice* proposed modifications to the existing guidelines and requirements instead of elimination. The *Notice* also proposed to solely rely upon specific statutory requirements in determining whether licensees have met their public interest responsibilities. These alternatives were rejected because the Commission concluded that it was best to rely to an extent upon current and future marketplace forces to satisfy the public interest responsibilities of commercial television broadcasters. The statutory option was further rejected because it compelled consideration of ancillary issues not necessary for our current purpose and requiring further comments.

97. Accordingly, IT IS ORDERED, That Parts 0 and 73 of the Commission's Rules and Regulations ARE AMENDED, effective September 24, 1984, as set forth in Appendix A.

98. IT IS FURTHER ORDERED, That the *Ascertainment Primer* and the *Renewal Primer* shall no longer be applicable to commercial television broadcast applicants or licensees and that in their place the above stated policy regarding ascertainment of issues shall apply to such stations.

99. IT IS FURTHER ORDERED, That FCC Form 303-C is ELIMINATED.

100. IT IS FURTHER ORDERED, That FCC Forms 301, 302, 314 and 315 will be amended by separate Commission action, in accordance with the provisions of this *Report and Order.*

101. IT IS FURTHER ORDERED, That the Secretary SHALL CAUSE a copy of this *Report and Order* to be published in the FCC Reports.

102. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

103. Authority for the action taken herein is contained in Sections 4(i), 5(c), and 303(r) of the Communications Act of 1934, as amended.

104. For further information concerning this *Report and Order,* contact David L. Donovan, Marcia C. Alterman, Freda Lippert Thyden, Thomas S. Walsh, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

1. 47 CFR 0.283 is amended by removing and marking [Reserved] the following subparagraphs and subdivisions: subparagraph (a)(6); subdivision (a)(7)(i)(B) subdivisions (a)(7)(ii) and (a)(7) (ii)(A) and (B); subparagraph (a)(8); and subdivisions (a)(8)(i) and (ii); and by revising subdivision (a)(7)(i)(A) to read as follows:

§ 0.283 Authority Delegated

(a) * * *

* * * * *

(6) [Reserved]

(7) *Programming: Program content and ascertainment of community needs.*

(i) Applications for new stations or assignments and transfers.

(A) Commercial AM and FM proposals and commercial TV proposals of applicants for new stations and of assignees and transfers that have not submitted a narrative statement of their proposed programming.

(B) [Reserved]

(ii) [Reserved]

(A) [Reserved]

(B) [Reserved]

(8) [Reserved]

(i) [Reserved]

(ii) [Reserved]

(9) * * *

* * * * *

2. 47 CFR 73.1225 is amended by revising subparagraphs (d)(2) and (d)(2)(i) to read as follows:

§ 73.1225 Station Inspections by FCC

* * * * *

(d) * * *

* * * * *

(2) *For noncommercial educational AM, FM, and TV stations*

(i) Program logs.

3. 47 CFR 73.1810 is amended by removing paragraphs (a), (b), (c) and (d) and marking [Reserved] to read as follows:

§ 73.1810 Program Logs

(a) [Reserved]

(b) [Reserved]

(c) [Reserved]

(d) [Reserved]

* * * * *

4. 47 CFR 73.1820 is amended by revising subparagraph (a)(1)(iii) to read as follows:

§ 73.1820 Station log

(a) * * *

(1) * * *

* * * * *

(iii) An entry of each test of the Emergency Broadcast System procedures pursuant to the requirements of Subpart G of this Part and the appropriate EBS checklist. All stations may keep EBS test data in a special EBS log which shall be maintained at any convenient location; however, such log should be considered a part of the station log.

* * * * *

5. 47 CFR 73.1850 is amended by revising paragraph (a) to read as follows:

73.1850 Public inspection of program logs.

(a) The program logs of noncommercial AM, FM, and TV licensees shall be made available for public inspection and reproduction at a location convenient and accessible to the residents of the community to which the station is licensed. All such requests for inspection shall be subject to the procedural requirements in

paragraph (b) of this section. Where good cause exists, the licensee may refuse to permit such inspection. (See paragraph 64, the Public and Broadcasting Manual). The licensee shall remain responsible for the safekeeping of the logs when permitting inspections.

6. 47 CFR 73.3500, Application and report forms, is amended by removing the entry for Form 303-C and its title, Renewal Application Audit Form for Commercial TV Broadcast Stations.

7. 47 CFR 73.3526 is amended by revising paragraph (a), paragraph (a)(8) and paragraph (e); by adding a Note following paragraph (a)(8), by removing paragraphs (a)(9), (a)(10), (a)(11) and (a)(12) and such subdivisions which are a part thereof; and by redesignating paragraphs (a)(13), (a)(14) and (a)(15) as (a)(9), (a)(10) and (a)(11) respectively, to read as follows:

* * * * *

§ 73.3526 Local public inspection file of commercial stations.

(a) *Records to be maintained.* Every applicant for a construction permit for a new station in the commercial broadcast services shall maintain for public inspection a file containing the material described in paragraph (a)(1) of this Section. (Every permittee or licensee of an AM, FM or TV station in the commercial broadcast services shall maintain for public inspection a file containing the material described in paragraphs (a) (1), (2), (3), (4), (5), (6), (7) and (11) of this Section. In addition, every permittee or licensee of a TV station shall maintain for public inspection a file containing material described in paragraphs (a) (8) and (9) of this section; every permittee or licensee of an AM or FM station shall maintain for public inspection a file containing material described in paragraph (a) (10) of this section. The material to be contained in the file is as follows:

* * * * *

(8) For commercial TV broadcast stations every three months a list of at least 5 to 10 community issues addressed by the station's programming during the preceding 3 month period. The list is to be filed by the tenth day of each calendar quarter (e.g. July 10, October 10, January 10 and April 10) and should include a record of programming for the 3 preceding calendar months (e.g. the list filed by October 10 would be a record of programming from July 1 through September 30). The list shall include a brief narrative describing how each issue was treated. The description of the program should include, but is not limited to, the time, date and duration of each program, the title, and the type of programming in which the issue was treated, (e.g. public service announcements, a call-in program with a public official, etc.). These lists are to be retained for the entire license renewal period.

Note.—The first quarterly filing is to include at least the past three months of a station's programming performance. If the last annual problems/programs list was filed more than three months prior to October 1, 1984, the licensee must place in its public inspection file an issues/programs list encompassing the period of time between its last annual filing and October 1, 1984.

* * * * *

(e) *Period of retention.* The records specified in paragraph (a)(4) of this Section shall be retained for periods specified in §73.1940 (2 years). The manual specified in paragraph (a)(6) of this Section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this Section shall be retained for the period specified in §73.1202 (3 years). The issues/program list specified in paragraphs (a)(8) and (10)

of this Section shall be retained for the term of license (5 and 7 years, respectively). The certification specified in paragraph (a)(11) of this Section shall be retained for the period specified in §73.3580 (for as long as the application to which it refers). The records specified in paragraphs (a)(1), (2), (3), and (5) of this Section shall be retained as follows:

* * * * *

8. 47 CFR 73.4010, Advertising time - amount of, is removed in its entirety.

9. 47 CFR 73.4080, Commercials, program length, is removed in its entirety.

10. 47 CFR 73.4220 Promise versus performance: Commercial announcements, is removed in its entirety.

APPENDIX B

SUMMARY OF COMMENTS

I. An Overview of the Comments

1. The *Notice* in this proceeding generated considerable response. The Commission received twenty-six formal comments,[1] eleven formal reply comments,[2] and numerous informal comments.[3] As discussed at greater length in the text below, commenters expressed

[1] Formal comments in this proceeding were submitted by the following parties: Action for Children Television (ACT), American Association of Advertising Agencies (AAAA), American Broadcasting Companies, Inc. (ABC), American Legal Foundation (ALF), Channel 57 Corporation (CFC), Choosing Our Future (COF), Columbia Broadcasting System, Inc. (CBS), John W. Detar (Detar), Direct Marketing Association (DMA), Cosmos Broadcasting Corporation, Cox Communications, and Multimedia, Inc. (DLA), Eagle Forum (Eagle), Henry Geller and Donna Lampert (Geller), Long Island Coalition for Fair Broadcasting (LIC), Television Station Licensees (MWK), National Association of Broadcasters (NAB), National Broadcasting Co., Inc. (NBC), National Center for the Law and the Deaf and National Association of the Deaf (NCL), National Telecommunications and Information Administration (NTIA), Mark Pierce (Pierce), Evening News Association, Gannett Co., Inc. Gaylord Broadcasting Company, and Lee Enterprises, Incorporated (PBD), Post-Newsweek Stations, Inc. (PNS), Public Media Center (PMC), Telecommunications Research and Action Center, Black Citizens for Fair Media, Chinese for Affirmative Action, Committee for Community Access, National Association for the Advancement of Colored People, National Committee for Better Broadcasting, National Council of Laraza, and Citizens Communications Center (TRAC), Tribune Broadcasting Co. (Tribune), United Church of Christ (UCC), United States Catholic Conference (USCC), and WRBG, Inc. (WRBG).

[2] Formal reply comments in this proceeding were submitted by the following parties: ACT, ABC, Association of National Advertisers (ANA), COF, Detar, MWK, NAB, National Black Media Coalition (NBMC), NTIA, TRAC, and UCC.

[3] The Commission received almost 400 informal comments in response to the *Notice*. Those which were relevant to our proposed action were considered accordingly. However, a substantial majority of the informal comments objected to this proceeding in the belief that this docket was designed to eliminate the Fairness Doctrine and the "rules of decency." While we recognize that one of the options proposed in the *Notice* may tangentially affect existing Fairness obligations, it should be noted that elimination of the Fairness Doctrine is not the focus of this proceeding. The Commission has recently

preferences all along the regulatory continuum identified in our *Notice.* Generally speaking, industry commenters tended to favor deregulation while public interest groups supported retention of the existing structure. However, numerous other viewpoints were expressed and parties often recommended hybrid versions of the options proposed in the *Notice,* or supported deregulation in some areas while favoring continued regulatory intervention in others.

II. Programming Guidelines

A. Introduction

2. The *Notice* requested comment on two policy options to modify the non-entertainment programming guidelines. Under Option I, the non-entertainment guidelines would be deleted but the Commission would retain the obligation of licensees to address issues of concern in their communities. This programming obligation would parallel that adopted for commercial radio stations in the recent radio deregulation rule making. Under Option II, the Commission would retain current programming policies but amend the current delegations to allow broadcasters more programming flexibility.

3. Comments ranged from absolute support for Option I to complete rejection of any changes in the present regulations. Among those commenting in favor of Option I were ABC, ALF, CBS, PBD, MWK, NTIA, NAB, NBC, Tribune, PNS, and WRGB. Those filing comments generally against the proposals contained in the *Notice* were: ACT, COF, Eagle, Geller, UCC, TRAC, USCC, Pierce and PMC.

4. Several commenters took intermediate positions. For example, NTIA generally supported the elimination of programming guidelines except for those concerning local programming. DLA said that the proposed deregulation would be of minimal significance given the court's interpretation of our radio deregulation order in *Office of Communication of the United Church of Christ v. F.C.C.*, 707 F. 2d 1413 (D.C. Cir. 1983) (*hereinafter "U.C.C. v. F.C.C."*) Accordingly, DLA did not object to the existing guidelines provided the Commission reaffirmed the broad discretion of licensees to determine the manner of compliance. PNS generally supported deregulation, but sought a uniform and quantitative programming standard for renewal purposes. ABC and MWK, while generally supporting deregulation, also requested further proceedings to adopt an "optional programming standard" for purposes of license renewal.

5. No commenter specifically supported Option II as contained in the *Notice.* Parties supporting Option I generally took the position that Option II did not go far enough with respect to deregulating the industry. Alternatively, those opposing deregulation objected to Option II as merely reducing the efficacy of regulation that should instead be strengthened.

B. Marketplace Definition

6. The *Notice* requested specific comments on the relevant product and geographic markets. Many of the comments did not define explicitly the relevant product market. Most of these parties, however, implicitly defined such a market in discussing the amount of competition facing television. Parties finding a competitive market usually included new and emerging technologies such as cable, STV, MDS, LPTV and DBS in their analysis. Those parties finding a lack of competition generally considered only the television broadcast market.

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adopted a *Notice of Inquiry* to consider the Fairness Doctrine. We believe it more appropriate to consider the issues raised by these pleadings in the context of the *Notice of Inquiry.*

7. Several parties adopted a broad definition of the relevant product market. CBS, for example, concluded that the Commission should include "all reasonably interchangeable entertainment/information products and services that strive for a fraction of consumers time." ABC basically adopted the Commission's definition of the marketplace but also included electronic publishing and the private operational fixed microwave service. Comments filed by Tribune and by PDB appear to have adopted the concept of a video marketplace which would include the new video technologies. NAB concluded that there is a "telecommunications marketplace" that consists of all electronic media including radio and the new technologies. NBC appears to have arrived at a similar conclusion by adopting a "media market approach."

8. Several parties urged a narrower definition of the relevant product market. TRAC, for instance, defined the relevant market as the television broadcast market. In reaching this conclusion, TRAC found that the television market was unlike other services because: (1) television programming is a "free" public good and not susceptible to substitution by other pay media, (2) television information is of a timely nature, (3) television broadcasting must be regulated in the public interest, and (4) television has no viable competition from the new technologies. Comments filed by the USCC, PMC, Geller and ACT also took the position that new video technologies were not viable substitutes for over-the-air broadcasting. Also, UCC said that the Commission's reliance on the *Report* prepared by The Office of Plans and Policy was not justified because the *Report* was not based on empirical measurement of any market. UCC suggested that the Commission stay the present proceedings in order to develop a proper marketplace measurement for video competition. TRAC, said that there are no data measuring the "cross elasticity between television and its substitutes."

C. Competitive Incentives

9. Almost all of the parties favoring elimination of the programming delegations found that the marketplace provided adequate incentives for the production of informational, local and non-entertainment programming. Most of these parties relied on the data supplied by the Commission in its *Notice.* NAB provided its own data which suggested that in 1983, the total amount of non-entertainment programming was almost three times that recommended by the Commission's guidelines. Specifically, NAB found that in 1983, commercial television stations devoted 17.3%, 8.9% and 29.2% of their programming time to informational, local and non-entertainment programming respectively. With the exception of local programming, this represents an overall increase in such programming over the last decade. NAB data also indicated that commercial television broadcasters exceeded the non-entertainment programming guidelines in all markets. Thus, parties favoring elimination of the delegations concluded that competitive forces, and not Commission regulations, are responsible for the current levels of non-entertainment programming.

10. Several industry commenters said that the television industry itself was sufficiently competitive to allow deregulation. For example, NAB noted that between 90 and 97 percent of television households receive four or more stations and at least 65 percent receive seven or more stations. ABC, citing the Commission's data from its "Financial Interest and Syndication" proceeding[4] noted that the network share of the television audience declined in 1982 from 90% to approximately 80%. In addition to finding competition in television broadcasting, these parties suggested that new technologies, including cable TV, STV, MDS, SMATV, LPTV, DBS, MMDS, video disc players and video recorders will provide over-the-air commercial television with significant competition in the future.

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[4] *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345. *(Amendment of Syndication and Financial Interest Rules).* 48 Fed. Reg. 38020 (Aug. 22, 1983).

11. The position of these parties was summarized by NAB as follows:

> We do not contend that narrowcasting has completely taken hold in the over-the-air television market. But we concur with the Commission's conclusion that traditional television and the new players in the video marketplace have more than begun to compete for the same viewers. Under the pressure of heightened competition from a variety of sources, television licensees will be forced to take account of the diversity of their audience and the programming offered by other video delivery systems reaching their community.

12. Parties opposed to deregulation generally agreed that the existing television marketplace is not sufficiently competitive to support programming deregulation. Furthermore, they argued that many new and emerging technologies are not yet available in the marketplace, and their commercial viability is uncertain at best. TRAC warned that even if these new services achieve such viability, they will not be viewed by the public as substitutes for free television. Rather, TRAC argued, the new pay technologies will compete among themselves as a supplement, not an alternative, to commercial over-the-air television. Finally, PMC suggested that an economic marketplace is incapable of maintaining the marketplace of ideas necessary to the operation of a democratic society.

D. Alternative "Non-Market" Justifications for Elimination of Non-Entertainment Programming Delegations.

13. The *Notice* propounded several non-market alternative justifications for deregulation. ABC and NTIA agreed that the Commission need not find a competitive market to justify the elimination of programming delegations.

14. Several alternative justifications were explored in the comments. Parties favoring deregulation argued that television should be regulated in the same manner as the new technologies. CBS noted that, unlike the new competing technologies, over-the-air television stations are subject to government-imposed program regulation. CBS contended that this will discourage investment and innovation in television broadcasting, and Tribune said it could restrict television from competing with the new technologies. These commenters and others argued that the law requires the Commission to provide a reason for such disparate treatment.

15. Parties opposed to deregulation generally supported the distinction between regulation of television and of new technologies. TRAC argued that because the new technologies are not yet commercially viable their relative lack of programming regulation did not place television at a competitive disadvantage. TRAC also found that the lack of regulation of new technologies is based on their "unique attributes" and the need for flexibility in their initial stages of development. Geller also observed that cable TV, television's most significant competitor, is burdened by public service requirements resulting from the franchising process which are more burdensome than the programming delegations at issue herein.

16. Parties supporting deregulation agreed that the benefits of the programming guidelines did not outweigh their costs. In particular, these commenters identified societal costs associated with the infringement on the editorial discretion of broadcasters. These parties also noted the monetary costs associated with verifying compliance with these standards.

17. Opponents of the proposal noted the societal benefits associated with non-entertainment programming. ACT, for example, discussed the societal benefits of children's educational programming. One commenter said that the television broadcasters benefit from the

guidelines because they provide some renewal certainty by defining what constitutes minimally acceptable programming in the public interest.

18. Several parties argued that the program delegations amounted to substantive regulations of content, thereby exacting First Amendment costs. At least one party noted that given the efficiency of the marketplace, the public interest was being met by less intrusive means. Accordingly, they argued that First Amendment concerns justified elimination of the delegations. Alternatively, those opposing deregulation argued that elimination of the guidelines would violate listeners' First Amendment rights to hear diverse sources of information.

19. Most of the parties supporting the elimination of the programming delegations found that deregulation would further the policies of the *Regulatory Flexibility Act* (PL 96-354, 5 U.S.C. §601 *et. seq.*) and the *Paperwork Reduction Act of 1980* (PL 96-51, 44 U.S.C. §3501 *et. seq.*) These commenters noted that elimination of the "unnecessary regulations" would provide greater flexibility to broadcasters to meet community needs and reduce paperwork burdens.

20. Opponents of deregulation argued that the regulations were necessary and therefore the elimination of the delegations would not further the goal of eliminating *unnecessary* regulations. TRAC argued that if broadcasters were already programming above the guidelines then the regulations were not too burdensome and broadcasters already had the flexibility to make appropriate editorial adjustments in their programming. UCC claimed that the goals of the Paperwork Reduction Act had already been met by the Commission.

E. Authority of the Commission to Eliminate Non-entertainment Programming Guidelines.

21. Several commenters opposing deregulation argued that the Commission may not eliminate longstanding regulations unless it has taken a "hard look" at the material facts and issues involved. *U.C.C. v. F.C.C., supra* at 1425. These parties argued that no hard data demonstrate that elimination of the programming delegations is in the public interest. Moreover, they observed that the television market cannot be compared to the radio market, because the level of competition in radio far exceeds that in television.

22. Parties supporting deregulation argued that while the radio market is different, there are sufficient competitive incentives in the video marketplace to justify deregulation of television. In addition, they noted that the Commission has the authority to rely on future projections of industry performance in formulating policy. *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

F. Specific Types of Programming.

23. Commenters supporting the elimination of the programming delegations argued that there would be no decline in news and informational programming. They stressed that broadcasters are now providing more local news and informational programming due to increased competition. Parties opposing the elimination of the guidelines argued that news and informational programming will decline. These commenters said the guidelines, not the market, are primarily responsible for the current levels of news and informational programming.

24. Those parties supporting deregulation argued that there would be no decline in local programming. These parties noted that many of the new technologies are not local in nature. As a result, over-the-air broadcasters will shift to local programming, particularly in the area

of news and informational programming, as a response to an increasing "nationally" oriented entertainment market.

25. Commenters opposing the elimination of these delegations said there has been a decline in local programming since 1973, and argued that the market will not ensure the production of sufficient amounts of local programming. For example, NTIA, which supports the elimination of the informational and non-entertainment guidelines, suggested retaining a local programming requirement. NTIA and Geller insisted that local programming is the foundation of the Commission's regulatory scheme.

26. Parties in favor of eliminating the programming delegations argued that programming to minority interests would not suffer any adverse consequences. NAB, for example, said that in typical markets with few television stations, licensees have a strong incentive to identify issues of concern to many different groups in order to attract broad audiences in their service areas. CBS argued that all minority interests will be met and noted that the Commission did not dictate the content of broadcasters' non-entertainment programming under existing guidelines.

27. Commenters opposing the elimination of the guidelines argued that licensees will still attempt to maximize their audience at the expense of diverse interests. These commenters said that because there is no direct pricing mechanism in television, a licensee is unable to measure the intensity of viewer demand. As a result, no matter how intense the demand for minority programming, these interests will not be satisfied. ACT said there has been a complete market failure with respect to children's programming. TRAC argued that the problem is exacerbated by the fact that the new pay services, which would normally respond to intense demand, may be too expensive for middle and low income people. In sum, these commenters took the position that marketplace incentives merely respond to consumer preferences and not to the needs of the community.

G. Alternate Proposals

28. Several industry commenters addressed the relationship between the programming delegations and renewal standards. Most of these parties requested the adoption of a policy either in this proceeding or in a separate renewal proceeding which would reduce the "uncertainty" surrounding the Commission's approach to renewal. Many favored a policy that would allow broadcasters to adhere to program guidelines on a "voluntary" basis if doing so would provide certainty in the renewal context.

29. PNS and CBS argued that the Commission should abolish comparative renewal. Absent elimination of comparative renewal, PNS argued for the adoption of a uniform standard which would apply to comparative renewal proceedings and petitions to deny. Meeting the proposed standard would give the licensee a presumption of sufficient programming service, and if the standard was not met a licensee still would be allowed to demonstrate if and why it is entitled to license renewal. If the Commission failed to adopt such a standard, PNS suggested that the Commission combine all non-entertainment programming categories and not distinguish among news, public affairs, and local programming. ABC and MWK said that if a renewal standard is not adopted, licensees, sensing renewal uncertainty, would merely adhere to existing guidelines, thereby negating the intended effect of deregulation. They said that the Commission would eventually be forced to return to some form of quantitative standard, perhaps even resurrecting *ad hoc* evaluation.

30. Several opposing commenters took the position that the guidelines were an integral part of the comparative renewal process and said that elimination of clear guidelines would amount to

an abdication of the Commission's public interest obligation. These parties argued that the failure to consider programming in renewal violates the public interest requirement of Section 309(h) of the Act.

31. The Commission's proposal to regulate according to the "statutory basics" of the Act failed to generate significant support. Broadcasters were generally concerned with the renewal uncertainty surrounding this proposal and suggested that the Commission conduct a separate proceeding on this issue that would *not* interfere with the current proposal to eliminate programming delegations. Citizen groups generally opposed this statutory approach, arguing that the Commission construed its statutory obligations too narrowly. These parties pointed out that the Communications Act mandates a consideration of the public interest and that the Commission is required to award licenses only to those who best serve the needs of their communities.

32. Several alternate proposals were offered. NTIA suggested that the Commission should conduct a periodic review of deregulation of licensees in various markets. COF suggested the adoption of citizen's viewer forums to provide broadcasters with community input into their programming choices.

H. Reply Comments

33. Eleven parties filed reply comments in this proceeding. NAB, ABC, and MWK restated their initial positions supporting the elimination of the programming guidelines. TRAC, UCC, ACT, COF and NBMC continued to oppose elimination of the programming delegations.[5] NTIA continued to generally support elimination of the guidelines with the exception of a specific obligation to broadcast local programming.

34. Apart from the NAB filing, no new data were submitted relative to the proper product and geographic market. NAB submitted an additional study conducted by Glassman-Oliver Economic Consultants Inc., which concluded that the local market was the relevant product market. Parties opposing elimination of guidelines continued to limit the product market to over-the-air commercial television.

35. All parties reasserted their initial positions with respect to the existence of competitive incentives in the marketplace. NAB, however, submitted an additional study which examined the programming of 189 commercial and public television stations in 30 markets. The study concluded that the average commercial broadcast market aired 14.8 hours of informational 7.2 hours of local, and 32.5 hours of total non-entertainment programming per week. The study also found that cable television provided an additional 16.6 hours of informational and 30.5 hours of total non-entertainment programming.

36. Opponents of deregulation continued to argue that the television market was not sufficiently competitive to eliminate the guidelines. ACT and TRAC cited the NAB's own study for the proposition that public affairs programming would decline with the elimination of the guidelines.

37. Commenters supporting deregulation took the position that a fragmented market, similar to that found in radio, was not a condition precedent to deregulation. Opponents of deregulation argued that a competitive market was a necessary prerequisite for the elimination of the guidelines. Supporters of deregulation also noted that the delegations were

[5] *NBMC did not file an initial comment in this proceeding.*

not statutorily based and therefore not essential to the Commission's obligation to regulate in the public interest.

38. Opponents of deregulation also questioned the costs associated with the current delegations. They noted that NAB data included the costs of producing and broadcasting public affairs and informational programming. These parties argued that if this type of programming was a product of the marketplace, then it should not be considered a part of the regulatory costs. Accordingly, they concluded that once this item is taken out of the cost equation, regulatory costs become de minimus. These commenters also noted that those supporting deregulation underestimated the substantial societal benefits associated with the guidelines.

39. Opponents of deregulation argued that minority interests would suffer with deregulation. NBMC argued that there is a segment of society, the "information poor", that depends on free over-the-air television. In the absence of regulation, the needs of these individuals would not be met since they cannot afford the "pay" alternatives. Commenters supporting deregulation argued that the market would supply programming to meet the needs of these people. Moreover, they noted that television broadcasters would still be obligated to broadcast in the public interest.

III. Ascertainment

A. Introduction

40. In the area of ascertainment, the *Notice* solicited comments on whether the competitive nature of the video marketplace has made the current level of regulation unnecessary. The *Notice* proposed two options and invited comments related to the options, as well as alternative proposals. Option I called for the complete elimination of formal ascertainment obligations. Option II called for the retention of an ascertainment obligation but would allow licensees to use any reasonable method in making their determinations. Commenters were additionally invited to comment on the costs and benefits of complying with the current requirements and, if some procedure is retained, whether the licensee should be required to place its ascertainment efforts in a public file or submit them to the Commission.

41. Comments on the ascertainment proposals presented in the *Notice* ranged from support for its elimination to assertions that both the substantive and procedural ascertainment requirements be retained. Several commenters also presented alternate proposals. Many broadcasters supporting deregulation suggested creation of "voluntary" standards that could be relied upon in license renewal proceedings.

B. Arguments in Favor of Relaxation of Ascertainment Rules

42. Broadcasters presented strong support for elimination of the formal ascertainment requirement. Many such commenters said that ascertainment procedures have become an end in themselves, and contended their formalism and rigidity have had the opposite effect of that intended, actually obscuring the licensee's ability to be responsive to community issue. NAB, ABC and others, noted that broadcasters were able to respond to community needs for nearly forty years before any formal ascertainment procedures were adopted and there is no reason to believe that they would not continue to be responsive if such requirements were eliminated. Broadcasters also pointed out that formal ascertainment is not specifically required by the Communications Act, and thus can be eliminated by the Commission.

43. Many industry members contended that marketplace forces would provide an adequate substitute to ascertainment procedures and obligations. NAB submitted data developed by the NAB Research and Planning Department, to supplement data presented in the *Notice*,

indicating that broadcasters present more informational, local, and non-entertainment programming than required by the Commission guidelines.

44. ABC, NAB, and NTIA cited these data as indicia of responsiveness to audience demand rather than to information gathered in ascertainment studies and thus concluded that this programming behavior is compelled by commercial necessity in a competitive marketplace. They also contended that the expanding video marketplace will continue to compel programming responsive to the community absent formal ascertainment. NAB stated that absent formal requirements, large market stations will, out of necessity, continue to engage in informal ascertainment in order to familiarize themselves with the broad array of interests characteristic of their communities of license. According to NAB, the fact that fewer television stations serve a community means that television stations aim to attract broader audiences, necessitating a continuing effort to identify issues of concern to the many groups each licensee seeks to serve. NTIA reasoned that since size and type of audience are directly related to station revenue, broadcasters have significant financial incentives to determine the needs and interests of the community.

45. While all commenters favoring the elimination of formal ascertainment procedures found them unnecessarily burdensome, most suggested retaining the substance of the requirement. CBS, for example, asserted that the purpose behind the rule — licensee responsiveness to issues of concern to the assigned community -- should remain an element in reviewing the public interest value of a station's service. CBS urged adoption of a minimum record keeping requirement in the form of an issues/programs list annually placed in the public file. CBS further suggested that such a list utilize broader issue-responsive programming categories that would potentially include news inserts and entertainment programming which adequately address community needs and concerns. CBS also suggested that a station should be allowed to consider the programming offered by other stations in its community and assess the particular composition of its audience in determining what programming is desirable. NBC urged that broadcasters be allowed to use any reasonable method in determining audience needs and interests and asserted that if challenged, the licensee should be allowed to show any and all measures it has taken to ascertain community needs.

46. NTIA agreed that the Commission should eliminate the current formal ascertainment requirement but suggested that ascertainment be made voluntary. Broadcasters who choose to ascertain would then be allowed to use that fact in comparative hearings. Broadcasters facing a programming challenge would be granted a presumption of adequate programming after presenting evidence of having completed formal ascertainment. The burden would then shift to the challenger who then would have to "make a showing based on product, not process."

47. Similarily, ABC and MWK expressed concern with the interplay of deregulation and comparative hearings. ABC asserted that deregulation should not be accomplished "without the concurrent development and adoption of a standard which, if voluntarily followed, would provide the licensee a basis for legitimate renewal expectancies." Without such guidance, ABC feared that renewal uncertainty would cause many licensees simply to adhere to existing requirements negating the purpose of deregulation.

48. While UCC generally questioned the rationality and timeliness of this proceeding, it supported the idea of retaining an ascertainment obligation but eliminating the specific procedures. UCC also urged that ascertainment documentation be kept on public file and be submitted to the Commission with license renewal applications.

C. Cost Data and Analysis

49. The cost of ascertainment relative to its benefit was cited as a major reason for the elimination of formal ascertainment procedures. For example, CBS reported that it recently spent over $10,000 in connection with the preparation by an outside research firm of the general public survey for the renewal of WCAU-TV, Philadelphia, in spite of the fact that the general survey studies had yielded no new information to the station for many years.

50. The NAB commissioned a study in which station personnel from twelve commercial television stations in three different market types (top 50 markets, 51-100 markets, and 101 plus markets) were questioned. The interviews, conducted by telephone, posed various questions regarding the costs and benefits of formal ascertainment. In the three market types surveyed, the annual ascertainment cost was approximately $9,000 in the top 50 markets, $2,400 in the 51-100 market, and $4,000 in the 101 plus markets. The projected annual cost for an average television station of meeting the ascertainment requirements in 1983 was estimated at $2,690. When asked about the likelihood of continuing some type of ascertainment if the formal requirements were eliminated, most stations said that some type of community outreach would occur because it was sound business practice and of value to the station's public image. However, four of the five top 50 market stations conceded that they would not do a general public survey.

51. Stations gave the following estimates of cost savings if the formalized ascertainment requirement was eliminated. The average station in the top 50 markets estimated it would spend 27% less money and 29% less time in ascertaining community needs; the average stations in the 51-100 markets estimated spending 25% less money and 18% less time; and the average station in the 101 plus markets estimated spending 29% less money and 23% less time. Seven stations indicated the reduction in costs and time would result from fewer leaders being surveyed; one station planned to eliminate ascertainment entirely; and two stations indicated the reductions would primarily result from the elimination of the need for legal counsel to review ascertainment materials.

52. Aside from actual dollar costs, the NAB study asserts that there are other costs related to ascertainment. Several stations indicated that the general regulatory burden and the fear of being penalized for failure to fulfill aspects of ascertainment are also costs of ascertainment. Stations also said that they would be better able to "customize" their own community outreach programs and thus reduce the costs if formal ascertainment requirements were eliminated. Although some stations conceded that ascertainment may heighten awareness of community problems and increase the public's access to the media, the NAB study concluded that the benefits are quite small since market forces would continue to assure that some form of ascertainment is perpetuated.

D. Arguments Opposing the Relaxation of Ascertainment Rules

53. A number of commenters opposed any reduction in current ascertainment requirements and procedures. The substance of this opposition stemmed primarily from the following contentions: 1) the marketplace is an inherently inappropriate substitute for regulation of the broadcast industry; 2) the television market is not sufficiently competitive to support deregulation at this time; and/or 3) the Commission's costs/benefit analysis of ascertainment undervalues the benefits of ascertainment. A few commenters questioned the propriety of a television deregulation proceeding at this time and suggested alternatives to the present ascertainment requirements.

54. Several commenters contended that the market does not necessarily respond to the public interest requirements of the Communications Act or the policies of the Commission. PMC and

TRAC contended that in the past the Commission recognized the difference between community problems, needs, and interests and "program preferences" and that this distinction should not now be eliminated. Removal of regulations like ascertainment, they argued, moves Commission policymaking away from the public interest and public trusteeship theories and toward a finding that licensees hold a vested property right in the license. PMC reiterated that the license is a public resource, and that affirmative public interest obligations and licensee accountability to the viewing public are required by the Act. Further, it said that entertaining a broad audience and serving the community are two distinct goals, and that the Commission has a clear role to insure that the latter goal is met by each licensee.

55. In addition, these commenters said that the Commission analysis of the television marketplace is insufficient to support a significant relaxation of the ascertainment requirement. Specifically, PMC argued that insufficient empirical data had been presented to permit the assumption that broadcasters would behave competitively under the marketplace approach. TRAC observed that the market reaction in television will likely be quite different from that in radio. In radio, TRAC asserted, there are many stations, discrete audiences and therefore less need for formal ascertainment. In contrast, TRAC contended, the market structure in television allows for fewer stations and a potentially "captive audience." This allows broadcasters to be successful in broadly addressing audience desires without specific familiarity with the problems, needs, and interests of the community. TRAC thus concluded that is only through some positive effort, like ascertainment, that the licensee can fulfill its public interest obligations to its community of license. While supporting some modification in ascertainment procedures, UCC agreed that the television marketplace is generally not sufficiently mature to rely upon market forces.

56. Other commenters contended that reliance upon market forces in the past has not proven reliable. ACT said that the continuing market failure in the children's television market has proven that reliance upon self - regulation and market forces is not a viable alternative, at least for childern's programming. Similarly, NCL alleged that the marketplace has failed to supply adequate service to the 16 million hearing-impaired Americans. They cited the continuing refusal of some licensees and one network to "close caption" as proof that market forces are not reliable. In addition, NCL noted that although the Commission has determined that the handicapped must take the initiative in present ascertainment procedures, this poses particular problems for the hearing-impaired because this public input is often accomplished by telephone surveys and call - in shows.

57. In assessing ascertainment on cost/benefit grounds, commenters opposing elimination contended that costs only exceed benefits when the benefits are undervalued. UCC said that significant benefits are acquired from the current procedures by the Commission in its statutory oversight function, by the broadcaster in indicating what sorts of procedures and programming will earn a renewal expectancy, and by the public in acquiring the means to measure and assess the broadcaster's service. TRAC asserted that while ascertainment has some costs it should simply be characterized as part of the cost of doing business using a public good.

E. Alternatives

58. Many commenters opposing the elimination of formal ascertainment suggested alternatives to the present procedures. TRAC suggested a return to reliance on the general policy as stated in the Commission's *1960 Policy Statement*, using the procedure in the *Primer* as an example of how to comply with that policy. TRAC said that retaining the *Primer* as a guide would stress the importance of discovering and responding to problems, and would allow the broadcasters the opportunity to fine tune the procedure. Eagle argued that adoption of either

option in the *Notice* would absolve broadcast licensees of any responsibility to their communities. Instead of eliminating ascertainment, Eagle suggested that the requirement be made "more realistic and helpful to members of the community who are concerned about the media." COF proposed that broadcasters be required, on a rotating basis, to provide an hour of prime time per month for "citizen-viewer forums" where citizens could directly voice their program needs and interests to broadcasters.

F. Reply Comments

59. Several reply comments were received by the Commission. NAB again cited a market structure which received little benefit from formal ascertainment. In a further economic study commissioned by NAB, broad product cross-elasticity, significant competition within local geographic markets, and above guideline performance were seen as persuasive evidence that licensees have incentives to ascertain.

60. NTIA, ABC, and MWK renewed their support for the elimination of formal ascertainment requirements. So long as the public interest standard is retained, ABC and MWK contended that public interest programming would continue. ABC and MWK also supported the development of an optional definition of "operation in the public interest." ABC suggested that among the factors to be considered should be the amount of non-entertainment programming presented (a single category), and the quantification of "substantial service." ABC and MWK suggested that development of this standard should be dealt with in a separate proceeding. NTIA reiterated its support for the continuation of voluntary ascertainment and the use of such voluntary documentation at renewal.

61. Other commenters reiterated their opposition to any action. Responding to NAB, TRAC said that the cost of ascertainment hardly seemed burdensome and pointed out that figures from other parts of the station budget were not presented to demonstrate the relative cost of ascertainment. TRAC further alleged that NAB figures were developed by non-random telephone interviews which, by NAB's own admission, are unrepresentative of the commercial television population as a whole.

62. Both TRAC and NBMC pointed out the difficulty of making an accurate cost/benefit analysis where costs are easily quantifiable and benefits are difficult to value. NBMC said the Commission has ignored the needs of the information poor, those unable to afford pay services, by relying upon a broader program delivery marketplace to create the impetus to ascertain fully community needs. NBMC further said that television stations are responsible for serving widely diverse groups whose needs they cannot possibly ascertain without formal requirements.

63. UCC stated that it continued to believe there is no need for formal ascertainment procedures, but they also supported the alternative suggested by TRAC - to return to the original requirement of the *1960 Policy Statement* and retain the present rules as an optional guideline for broadcasters in meeting their ascertainment obligations.

IV. Commercial Guideline

A. Introduction

64. In the area of commercial practices, the *Notice* solicited comments on whether the increasingly competitive nature of the television marketplace has made the present level of regulation unnecessary. Commenters were asked specifically to consider both the product market (*i.e.* substitutable alternatives) and the spacial or geographic market. The *Notice* proposed two options, invited comments on action anywhere along the regulatory continuum the options defined, and invited alternative proposals. The proposed options were: I) the

elimination of all rules and policies restricting the amount of commercial time and reliance on marketplace forces to regulate levels of commercialization; and II) the amendment of the commercial time restrictions to give broadcasters more discretion and encourage experimentation but retention of some oversight authority.

65. Comments submitted expressed preferences all along the regulatory continuum defined by the *Notice*. The determining factor in each case was usually dependent upon how the commenter defined the relevant market and associated assumptions on the level of competition within that market.

B. Comments Supporting Elimination of the Guideline

66. The elimination of all consideration of commercialization and reliance on regulation through the operation of the marketplace, Option I in the *Notice*, received the unanimous approval of broadcasters submitting comments in this rule making and the endorsement of a majority of commenters overall. Parties supporting the adoption of Option I tended toward a broad definition of the video marketplace, including commercial broadcast television, cable television, STV, MDS and video cassette recorders and disc players. Many commenters felt the fledgling LPTV, DBS and MMDS services should be included in the competitive matrix as well. CBS and ALF encouraged an even broader definition of the relevant market to include all entertainment and information alternatives on the theory that broadcast television competes against every alternative form of leisure activity available to a potential viewer. Commenters supporting the adoption of Option I claimed that competition in the video marketplace would effectively control the level of commercialization and prevent abuses. NTIA suggested that competition need only function as well as government regulation to be preferred while CBS claimed that any alleged benefit of the guideline was illusory absent a finding of harm from specific levels of commercialization. Tribune stated that the "right" level of commercialization should be determined by the video marketplace and not the Commission, and that different stations could serve the public interest and the needs of a specific audience at different levels of commercialization.

67. In addition to marketplace factors, several commenters also suggested that the commercial guideline and policies should be eliminated because they violate the First Amendment protection of commercial speech and force the Commission to become over-involved in the regulation of program content.

68. CBS, NTIA, and AAAA raised the possible effects of increased commercial "clutter" in response to elimination of the processing guideline. CBS and NTIA asserted that marketplace forces would protect the public while AAAA suggested the need for monitoring by the Commission to insure that excessive clutter would not adversely affect the public interest.

69. Several commenters supported the idea that Option I would give broadcasters increased flexibility to experiment with new or unconventional advertising formats. NAB suggested that broadcasters' current inability to present innovative and detailed commercials has placed them at a significant disadvantage to competing video services.

70. Finally, a few comments warned that the commercial guidelines and policies are anticompetitive. Specifically, CBS claimed that they potentially depress available commercial time below advertiser demand thus driving up its cost and ultimately resulting in increased consumer prices and the inability of smaller business concerns to afford the purchase of broadcast time.

71. Several commenters specifically noted that the elimination of the guideline should include elimination of the Commission's ban of program length commercials.[6] Some suggested that the ability to more fully inform consumers is in the public interest, whether or not the information is technically an advertisement. The comments filed by DLA suggested that program length commercials might help minority-owned stations to obtain a secure revenue base. Some commenters noted that to avoid confusion, the *Order* should specifically address this issue.

C. Comments Supporting Retention of the Guideline

72. The prevalent theme of those commenters supporting retention of the commercial guideline, either in its present form[7] or with some modification,[8] was that the market is not as competitive as the *Notice* suggests. Many of these parties asserted that the relevant market should be narrowly defined as commercial broadcast television. They observed that new services such as DBS, LPTV and MMDS are not yet viable and may never be a significant factor in the video marketplace. For example, TRAC questioned whether any of the alternative modes of program delivery would ever compete with the networks, and said it is more likely that new media would compete among themselves "for the right to provide the consumer with discretionary viewing services beyond traditional network programming."

73. The idea that cable television should be included in the definition of the relevant market was advanced by several commenters. However, these parties warned that cable would not reduce network dominance sufficiently to make the market workably competitive. In addition to the concentration of ownership in cable, they emphasized that increasing the number of outlets would not necessarily similarly increase the number of voices.

74. Many commenters, endorsing continued regulation, said that the relevant video market, unlike radio, was not sufficiently competitive to operate in the public interest without Commission regulation of commercialization. The study analyzing commercial behavior by licensees, reported in the *Notice*, drew criticism from these parties because it covered a period when the NAB Code was still in effect. ACT also alleged that the use of statistical averages concealed commercial abuses among a significant minority of licensees. PMC contended that if, as the study suggested, most licensees now operate below the 16 minute commercial guideline, then the guideline posed little regulatory burden. ACT agreed, noting the absence of any evidence that compliance with the guideline was attributable to the effect of market forces rather than to the standard.

75. Parties opposing elimination of the commercialization guideline argued that market forces cannot assure that the public interest will be served. TRAC suggested that because of the role of advertising in commercial television there is no direct relationship between the buyer and seller, *i.e.* the viewer and licensee, and thus there is no effective demand mechanism for public interest programming. The guideline, they said, provides a ceiling so licensees won't waste a valuable public resource by engaging in overcommercialization. ACT stressed that the public interest generally focuses on programming and that eliminating the guideline would allow licensees to increase commercials at the expense of programmed time. Several commenters agreed that fostering increases in commercialization would subordinate the public welfare to the financial gain of licensees, particularly in the absence of any showing of a positive correlation between commercial time and public service.

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[6] ABC, Detar, DMA, DLA, MWK and NBC.

[7] Eagle UCC, ACT, and Pierce.

[8] TRAC, UCC, USCC and PMC.

76. Commenters opposing elimination of the commercial guideline predicted increased commercialization on all broadcast television stations. They charged that present abuses occurring with the guideline in effect, particularly in the area of program length commercials directed at children, would be greatly magnified without it.

77. Thus, those commenters favoring retention of some form of commercial guideline, concluded that commercial regulation facilitates the Commission's public interest determination without violating the licensee's First Amendment rights. They asserted that the market is not sufficiently competitive to regulate itself, and that complete broadcaster control of commercialization is not otherwise warranted, thus Option I of the *Notice* should be rejected.

78. In addition to the above-noted comments, ACT urged special consideration of the issues unique to children's programming. It said that complete market failure in that area mandates special treatment of commercialization. Specifically, ACT charged that the "change-the-dial" theory of viewer control cannot be applied to children who often don't understand the "selling" purpose of advertisements. Furthermore, ACT charged that Option I, by its failure to differentiate children from adults with reference to its treatment of commercialization, is inconsistent with the fiduciary's duty of care owed to children and therefore violative of the public trust. ACT recommended a reduction in the level of commercialization directed at children, and further regulation of whatever commercialization is permitted. They also urged reaffirmation of the prohibition against program length commercials for children.

D. Alternate Proposals

79. Several commenters proposed additional alternatives or partial variations to the proposals considered in the *Notice*. TRAC suggested retention of the 16 minute commercial ceiling as a daily average but proposed allowing 25% of programming to include up to 20 minutes of commercials as long as that 25% was not during children's or public service programming. NTIA suggested requiring a party filing a petition to deny or a competing applicant to bear the burden of proof that a renewal applicant's commercial time record is inconsistent with the public interest. PNS emphasized the need for quantitative renewal standards to create a legitimate renewal expectancy. Finally, UCC argued that since the role of the Commission is to assist Congress, the Commission should simply refrain from any action herein until Congress has concluded its legislative revisions in broadcasting.

E. Reply Comments

80. Reply comments submitted in this proceeding reflected the same consensus as the comments discussed above. Most parties simply reiterated their earlier stated position on commercial practices. NBMC, which did not submit an earlier pleading, endorsed the elimination of commercial time standards. NBMC suggested that the guidelines prevent the broadcast of programming which might benefit minorities, such as job-a-thons, because they are considered to be program length commercials. They noted, however, that the market definition should not include pay video as a substitute for free television and should not equate television and radio because unlike radio, no commercial television stations are primarily programmed to serve black audiences and none of the eight Black-owned television stations is in a Top 50 market.

81. In addition to NBMC, NAB also endorsed Detar's request for the explicit elimination of the Commission's ban on program length advertisements while NTIA suggested that such action should be considered in a separate proceeding.

82. Several parties addressed the concerns of AAAA. UCC agreed as to the danger posed by excessive clutter and the need it created for a monitoring mechanism, while MWK argued that

clutter is not a legitimate concern of the Commission. TRAC noted its agreement with AAAA that market forces could not prevent excessive commercialization and chastised broadcasters for seeking a scheme which would include regulation by marketplace plus a guaranteed renewal expectancy. Finally, ACT claimed that the Commission needed to obtain reliable data on whether the public wants limits on commercials before it could properly regulate in this area.

V. Program Logs

A. Introduction

83. On the program log issue, the Commission noted that the program record keeping requirements adopted here would relate directly to substantive changes adopted in this docket. The *Notice* solicited comments on the specific program record keeping requirements adopted in the radio deregulation *Report and Order* and considered in the *Further Notice* in that docket and the propriety of applying those to television licensees.[9] Alternatively, commenters were asked to address whether a revised program logging rule, by itself, would satisfactorily meet the Commission's information collection needs. Commenters were asked to assess the Commission's information needs in light of the various substantive proposals in the *Notice*, taking fully into account the cost of imposing specific requirements. In this regard, commenters were asked to tailor their recommendations to assure the retrieval of only truly needed information in order to minimize the burden imposed on licensees.

84. Commenters fell into roughly two broad categories of interests and approaches. The first group included a large number of industry members who advocated a streamlined approach to reporting and emphasized the need to give licensees the greatest possible flexibility in determining the reporting format.[10] The second, somewhat smaller, group consisted of public interest groups and other organizations that generally supported a status quo approach and emphasized the public's interest in monitoring station activity through data produced by the current logging requirements.[11]

B. Comments Supporting a Streamlined Reporting Requirement

85. All of the commenting broadcasters, and NAB, NTIA, and ALF agreed on two preliminary issues: (1) that the current logging requirements are too burdensome to justify the small benefits derived, and (2) that television and radio should have the same reporting requirements.

86. NAB's comment included a study, the Wirth Report, which found that the logs are primarily a tool for tracking commercial spots and, thus, the most important benefit from current logging practices accrues to the stations themselves. The Wirth Report also found that there is an "overwhelming disinterest" by the public in the logs and cited the Commission's own minimal use of the data. Broadcasters said that the high level of competition in the television market makes any regulatory distinction between radio and

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[9] The radio deregulation proceeding required a yearly issues/programs list to be on public file. However, *U.C.C. v. F.C.C.* supra, remanded the case to the Commission on the logging issue and instructed the Commission to reassess its information needs. Thus, the Commission issued a *Further Notice of Proposed Rulemaking* (*"Further Notice"*), BC Docket No. 79-219, adopted June 29, 1983, to reconsider this matter.

[10] For example: NAB, PNC, Tribune, ABC, CBS, NBC, PBD, WRGB, CFC, NTIA, DLA, and ALF.

[11] For example: AAAA, CCC, UCC, ACT, Geller, USCC, Eagle, and LIC.

television inappropriate for reporting requirements. Those in favor of a streamlined approach also advocated greater licensee flexibility in reporting and most advanced the proposition that the Commission accept information from readily available sources such as *TV Guide*, newspaper listings and slow speed video tapes.

87. Broadcasters addressing the two-tier logging proposal in the *Further Notice* generally disagreed with the proposition that such detailed reporting is required by *U.C.C. v. F.C.C. supra.* The *Further Notice* outlined a system requiring a yearly exemplary issues/programs list with at least 5-10 issues which would be supplemented by a quarterly list of all issue-responsive programming aired including the time, date, length, and the issue addressed in each program. ABC, NBC, CBS and other commenters argued that this approach goes too far and that less burdensome alternatives would satisfy the Court of Appeals. ABC said:

> While it may be necessary to develop a slightly more detailed record of issue-oriented programming than the annual issues/programs list, the court's order plainly does not require an effective reinstitution of daily logging. If the court was critical of the Commission's sole reliance on the issues/programs list it was only because that list is limited to highlighting 5-10 issues per year. The court did not disapprove of the concept, only the relatively limited nature of the existing requirement.

88. Broadcasters also argued that the detailed quarterly report and the annual exemplary log considered in the *Further Notice* would constitute a duplicative exercise, a "regulatory overkill." WRGB maintained that the status quo would be preferable to this alternative. The television networks said that the running tabulation of a quarterly issues/programs log would be particularly burdensome to those stations that devote large blocks of time to news and information features because they would have to identify each issue covered during long programs such as "Good Morning America" and the "Today Show."

89. Most of the commenting broadcasters suggested that the Commission adopt a slightly expanded version of the issues/programs list originally considered in the radio deregulation docket. They suggested that this be issued annually or, at most, semi-annually. PBD and DLA proposed a record of all issue-oriented programming, giving the time, date, duration and issue addressed with no requirement to log commercials. DLA said that this would actually increase the amount of program information available to the Commission and the public since the current requirements do not call for any program content information. ALF urged the Commission to require licensees to include in their public files only information showing that they have identified and addressed issues of concern in their communities, leaving the licensee free to determine the format best suited to their individual needs. NAB agreed with the two-tier record keeping approach of the *Further Notice* but suggested that the report be required semi-annually instead of quarterly. It agreed that licensees should have maximum flexibility in recording this information to minimize regulatory costs and to enable licensees to tailor the method to suit their own business purposes. NTIA, consistent with their proposal to require local programming, would require a record of such programming.

C. Comments Supporting Continued Logging Requirements

90. The "public interest" category of commenters unanimously agreed that logging requirements play a critical role in the public's ability to participate in the licensing process and that the contemplated two-tier "streamlined" logging requirements would be inadequate for such purposes. Most said that the burden of logging on licensees is minimal because broadcasters would maintain logs for their own purposes, regardless of the Commission's requirements. These commenters weighed this minimal licensee burden of maintaining the logs against their public interest value in monitoring station performance and concluded that logging should be maintained.

91. Many of these commenters, including Geller, ACT, UCC, and USCC, analyzed the question using a public trustee theory of regulation and thus found that the logs are necessary for the public to measure the performance of licensees. They argued that the logging requirements are statutorily grounded because individual station accountability is required to meet the public interest standards in the Act, including especially Sections 307 and 309 governing license renewals. Several of these commenters said that the Commission justified the short form renewal decision by relying on public participation to inform the Commission of public interest violations, and that without logging there is no way for the public to do so effectively. Similarly, PMC asserted that logging is critical in light of the heavy reliance on the petition to deny process in identifying licensees not fulfilling their public interest obligation. It also said that the lack of comprehensive programming information would be even more important if ascertainment guidelines are eliminated because the cumulative effect of adopting both proposals would be to place a station's performance beyond public reach. UCC said that it is impossible to analyze the logging issue until the programming requirements are determined, therefore logging should be considered in a subsequent proceeding.

92. Other commenters had additional reasons to maintain the logs. AAAA, representing the interest of advertisers, said that the logging rules should be maintained to provide "proof of performance" and to supply the Commission with reliable data for making policy judgments. ACT said that the Commission should require an annual chart that would report the amount and target age of programming designed for children. Geller argued in favor of logging all critical public interest programming in categories that would reduce the burden on the public of analyzing the current "raw logs."

D. Reply Comments

93. In reply, proponents of television deregulation once again argued that the current program logging requirements are unnecessary as well as overly burdensome and should be reduced. They contended that a limited record keeping procedure tied to community issue programming is all that is needed and favored an issues/programs list. A few commenters submitted, however, that some form of logging should be maintained so that the Commission can determine if a station is using its license in the public interest. In this regard, NTIA commented favorably on NBC's suggestion that a "slow tape" be considered an acceptable program record whereas NAB stated that an illustrated complement of issue-responsive programming should supplement the issues/programs list. In response to the allegation made by some commenters that the FCC program logging rules provide a wealth of information concerning a station's responsiveness to the community, NAB argued that these regulations actually require nothing concerning program content.

94. NAB, as well as other commenting parties, particularly opposed UCC's suggestion that a new program record keeping requirement not be considered until after the completion of the Commission's determination as to what program requirements will be placed upon television broadcast licensees. NAB contended, as did NTIA, that any program record keeping requirement should be relevant to a television station's programming responsibility. They submitted, however, that a two-step approach was not necessary to accomplish these related goals and that UCC's suggestion of a separate proceeding to resolve this matter was impractical. NTIA commented that the alteration of the logging requirements would flow directly from changes made in the guidelines and logically should be implemented at the same time the pertinent regulations are changed.

95. There was also concurrence with NTIA's recommendation that program record keeping requirements be made as simple as possible. NAB commented favorably on NTIA's suggestion that a station be allowed to furnish, as documentation of public interest

performance, a listing of program clippings from a local newspaper program guide, as long as the station were to verify the accuracy of such listings. It was thought that supplemental program records of broadcast licensees should be able to include newspaper and *"TV Guide*-type" listings.

96. Those opposing the deregulation of television commented, in respect to the program log issue, that the courts have repeatedly recognized the underlying obligation of broadcasters to address community needs in programming. Therefore, they asserted, the Commission must continue to collect information necessary to further this statutory requirement. They also argued that the FCC must retain sufficient program log requirements to protect the public's right to participate in broadcast licensing and to allow the Commission to evaluate the effect of its regulatory revisions on the television industry. ANA found it to be inconsistent to award the exclusive use of a frequency to a television broadcaster on the condition that the public interest standard be observed without at the same time requiring that the broadcastr maintain, for public inspection, reasonable and reliable evidence of what the broadcaster actually aired. NBMC argued that because the monitoring of station imposes costs which are extraordinarily high, the NBMC argued logging in some form is essential. Indeed, it submitted, the petition to deny process would be meaningless without logs. NBMC contended that if the public is to be relied upon to initiate all complaints resulting in heightened scrutiny by the Commission of licensee performance, it must at least be provided with the basic information required for making the reasoned analysis of compliance with the statute and the Commission's rules. A related problem, NBMC noted, could arise in the case of a challenged station which would be unable to defend itself against a challenge because it maintained no records. Such a licensee could, NBMC argued, justifiably accuse the Commission of allowing it to feel that keeping records was unnecessary since none had been required.

97. NBMC concluded that a log containing information on programs and announcements which are non-entertainment in nature, with their dates, times, durations and issues discussed, would be sufficient if it also included information on the spokespersons appearing in the programs. Without this information, it was asserted, it would be impossible to determine whether a station had excluded Blacks and other minorities from discussion of public issues. Commenters suggested that this information should be retained for at least two license terms in the public file, segregated from information on commercials and entertainment programming so as to facilitate non-burdensome access by the public.

98. As to whether a log is burdensome to broadcasters, NBMC responded in the negative. It submitted that this information is already regularly maintained by program producers so there is no additional burden to broadcasters. Furthermore, TRAC argued that NAB's study indicated that an average station in a Top-50 market would reduce its logging expense by only .06 percent if current logging requirements were eliminated. TRAC indicated it was at a loss to understand how elimination of a regulation which broadcasters would allegedly continue to follow could result in a meaningful cost savings. However, TRAC alleged that unless logging requirements are maintained, licensees will not maintain logs for sufficient time to allow public or Commission monitoring of overall performance over a license term. ACT supported TRAC's contentions and argued that trivial savings would result from eliminating logging rules.

99. ACT submitted that our present logging requirements should be retained to further the statutory goal of standardization of paperwork. It argued that program logs are maintained, in large part, for public use and the public use of any informational system is plainly facilitated by standardization of paperwork. Also, ACT disputed NAB's conclusion that the public is benefitted by the Commission's logging requirements in only a small way, noting

that NAB's conclusion is not based on any data from members of the public or from regular public users of program logs.

100. UCC reiterated its belief that the logging component of this proceeding should follow any final action regarding non-entertainment programs, commercial guidelines and ascertainment rules. Only then, it argued, would commenters and the Commission be able to assess this issue, taking into account the record-keeping requirements relative to the Commission's changes.

Appendix C

Analysis of Video Marketplace

1. During the past decade there has been tremendous growth in the video marketplace. Rapid development has occurred not only in over-the-air television, but also in cable television and new video technologies.[1] Currently, approximately 90 percent of all television households receive four or more television signals[2] and 65 percent of television households receive seven or more signals.[3] This is a dramatic increase in signal availability since 1964 when only 26 percent of television households received seven or more signals and only 78 percent received four or more signals.[4] When the contribution of cable television is considered, the average household now receives approximately 9.8 signals, an increase of 44 percent since 1970.[5] The following discussion is intended to provide a brief outline of both the current video marketplace and our expectations as to future development. We shall analyze the market by focusing on the three major participants in the current video marketplace (1) over-the-air television, (2) cable television and (3) the new video technologies.

a) Over-the-Air-Television

2. Over-the-air television broadcasting, both commercial and non-commercial, has continued to expand since the adoption of the guidelines in 1973. There are currently 178 more commercial television stations than in 1973, representing an increase of 25 percent from 700 to 878 as of March 31, 1984.[6] Equally significant has been the overall expansion of non-commercial television stations. The number of non-commercial television stations increased from 229 in 1973 to 285 as of March 31, 1984.[7]

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[1] *See* Stern, Krasnow and Senkowski, "The New Video Marketplace and The Search for a Coherent Regulatory Philosophy," 32 *Cath. U. L. Rev.* 529 (Spring 1983) (for a thorough discussion of the emerging video marketplace.)

[2] *F.C.C. Staff Report on Cable TV Cross Ownership Policies*, November 17, 1981, pp. 62-64. Tables 1 and 2 report this figure as 90.26 and 89.75 depending on assumptions, Table 3 states 90 percent receive 3 or more television stations, again using different assumptions.

[3] *Notice of Proposed Rule Making* in MM Docket No. 83-670 (Revision of Programming and Commercialization Policies, Ascertainment Requirements and Program Log Requirements for Commercial Television Stations) 48 Fed. Reg. 37239, 37243 (August 17, 1983) (hereinafter *"Notice"*).

[4] *Id.*

[5] *Tentative Decision and Request for Further Comments* in BC Docket No. 82-345 (Amendment of Syndication and Financial Interest Rules), 48 Fed. Reg. 38020 (August 22, 1983) (hereinafter *"Tentative Decision"*).

[6] *See Notice* at 37251 (1973 data); 1984 data taken from "Broadcast Station Totals for March 1984", F.C.C. *News Release* April 18, 1984. There are currently 344 commercial UHF stations and 534 commercial VHF stations.

[7] *Id.* 1984 data include 112 VHF and 173 UHF non-commercial stations.

3. Of particular significance has been the growth of independent television stations which have increased from only 90 stations in 1970 to 179 in 1983.[8] The most rapid expansion has been in the number of UHF independents from 59 stations in 1970 to 154 stations in 1983.[9] Independent stations are currently located in 86 different television markets accounting for 78 percent of all television households.[10]

4. The growth in over-the-air television is expected to continue, as there is additional room for expansion in the industry. There are currently 39 vacant commercial VHF channels and 90 vacant UHF channels.[11] Eleven of the commercial VHF vacancies and seventeen of the commercial UHF vacancies are in the top 50 markets.[12] At least one estimate has stated that the number of television households will reach 97 million by 1990.[13]

5. The rise of independent television stations, coupled with an increase in the absolute number of television stations, offers a more competitive environment than existed at the time we adopted our delegations. Network dominance has been seriously challenged. In 1982, the network's share of the audience fell from 90 percent to 80 percent.[14] During this time period, independent television stations captured a 17 percent share of the audience.[15] In addition, the networks currently account for only 54 percent of the total video product purchased for television.[16]

6. Consideration must also be given to the rapid rise of non-commercial television. A majority of the nation's families now watch public television with a weekly audience of 43 million families in 1983.[17] The percentage of families viewing public television is 69 percent higher than it was five years ago.[18] At least one estimate has placed non-commercial television's potential growth at approximately 10 percent of the overall audience share.[19]

b) Cable Television

7. In addition to the net increase in competing television stations, over-the-air commercial television broadcasters must take into account the rapid growth in the cable television industry. In 1952 there were only 70 operating cable systems with an estimated 14 thousand subscribers. In 1973, the year we adopted the delegations, there were 2,991 operating systems with an estimated 7.3 million total subscribers.[20] Recent Arbitron data places cable penetration at 39 percent or slightly more than 32.5 million homes while Neilson's most recent estimate places penetration at 40.5 percent or approximately 34.1 million homes.[21] At least one

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[8] *See, Tentative Decision*, at 38025, citing *Television Factbook*, Services Volume 50, 1981-82, pp. 75-a, 83-a; *Cablevision*, April 11, 1983, p. 69.

[9] *Id.*

[10] *Id.*

[11] *Television Channel Utilization*, FCC Release No. 2266 (February 8, 1984).

[12] *Id.*

[13] *See* Tentative Decision at 38037.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] FCC Report, *Temporary Commission on Alternative Financing for Public Telecommunications*, Appendix V, October 1983.

[18] *Id.*

[19] *Broadcasting*, February 20, 1984, p. 66.

[20] *Notice*, at 37252, App. A Table 3.

[21] *Broadcasting*, March 5, 1984, p. 11.

estimate has placed subscribership at approximately 29 million homes.[22] Future projections of growth in the cable industry estimate that penetration will reach 60 percent by 1990 with basic subscribership at approximately 58 million.[23]

8. Some commenters have argued that subscription rates rather than cable penetration rates should be the proper measure of the growth of cable television. Such a distinction ignores the most important aspect of the industry's development. Cable is already affecting the programming menu of over-the-air television to the extent that broadcasters are already altering their programming to prevent erosion of their audience.[24] It has been estimated that all other factors being equal, cable growth alone could reduce the total network dominance from 78 percent of the audience to 72 percent by 1990.[25] Moreover, cable television has become a significant component in the further distribution of non-commercial public television.[26] It appears therefore, that over-the-air commercial television will continue to face significant competition from the cable television industry. The substitutability of cable television for over-the-air television will not only increase the number of viewing options, but it will also affect the type of programming that appears in over-the-air advertiser supported commercial television.[27]

c) Alternative Video Technologies

9. While cable currently provides the most significant competitive spur to over-the-air television, new and developing technologies such as STV, MDS, SMATV, LPTV, DBS and Multi-Channel MDS will play a significant role in the programming decisions of commercial television broadcasters in the future. The following table provides a reasonable estimate of the contribution of these technologies in the near future.

Availability of Video Options[28]
in (millions)

	1970	*1975*	*1983*	*1990 Est.*
Broadcast TV (TV HHs)	59	70	83	97
Cable TV (subscribers)	5	10	28	58
Pay Cable (subscribers)		0.5	23	45
STV (subscribers)			1.4	5
MDS (subscribers)			0.5	3.2
SMATV (subscribers)			0.15	0.5-0.8
LPTV (TV HHs)				10
DBS (subscribers)				11
Multichannel MDS (subscribers)				6-12

[22] *Cablevision*, December 5, 1983, p. 134.

[23] *Tentative Decision*, at 38036.

[24] *Broadcasting*, March 5, 1984, pp. 56-57.

[25] *Broadcasting*, December 12, 1983, p. 35.

[26] Report, *Temporary Commission on Alternative Financing for Public Telecommunications*, Appendix V, October 1983.

[27] *See*, Levy and Pitsch *Statistical Evidence of Substitutability Among Video Delivery Systems*, April 1984, p. 30. The study, while focusing on the substitutability of VCR's, television and cable television, concludes that over-the-air television and pay cable systems are substitutes.

[28] *Tentative Decision* at 38037.

As the above data demonstrate, these alternate video technologies, excluding cable, will account for approximately between 25.7 million to 42 million subscribers by 1990. Therefore, these technologies will comprise anywhere between 11.38 percent to 17.35 percent of the viewing audience.

10. These new technologies are already asserting themselves in the marketplace. For example, there are currently 272 low power television stations (LPTV) in operation.[29] Moreover, the Commission has received more than ten thousand applications for these stations. Thus far approximately 356 applicants have been licensed or granted construction permits. When fully developed this service could add an additional 4000 new television stations.[30] Because of their inexpensive nature, we expect these stations to develop in areas that have heretofore been unserved.

11. Another new technology beginning to emerge into the marketplace is Direct Broadcast Satellite service. This service has already commenced operation in some areas of the country. It is estimated that there are currently 500,000 backyard earth stations and that number is increasing at a rate of 30,000 per month.[31]

12. In addition, Multipoint Distribution Service (MDS) is making significant inroads into the video marketplace. There are currently approximately 530,000 subscribers to this system and it could potentially reach a subscriber base of over 15 million.[32] As of June 1983, there were approximately 103 MDS systems in operation.[33]

13. We believe that these technologies will provide a competitive spur to existing video markets that are primarily composed of television and cable television services.[34] It is of course difficult to predict with any degree of certainty the precise market structure of the future video marketplace. We believe however, that the additional competition provided by the new technologies, as well as continued growth in both traditional over-the-air and cable television, will ensure the continued presentation of programming that responds to community needs.

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[29] Broadcast Station Total for March 1984, *FCC News Release No. 3690*, April 18, 1984.

[30] *Notice* at 37245.

[31] *Broadcasting*, February 20, 1984, p. 67. *See also, Direct Broadcast Satellite Television Corporation*, 91 F.C.C. 2d 953 (1982); and *CBS, Inc. et. al.*, 92 F.C.C. 2d 64 (1982).

[32] Paul Kagan Associates, Inc., *Census of MDS TV* (June 30, 1983) (August 24, 1983).

[33] *Id.*

[34] In addition to these technologies, video cassette recorders are making significant inroads into the marketplace. There are approximately 10 million VCR's now in the market. This figure is expected to triple by 1988. *See Broadcasting*, February 6, 1984, pp. 12, 38.

AN EMPIRICAL STUDY OF THE DETERMINANTS OF NEWS & PUBLIC AFFAIRS AND LOCAL PROGRAMMING CHOICES OF COMMERCIAL TELEVISION BROADCASTERS

MAY 1984

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I. Introduction

1. For nearly four decades, the programming choices of commercial television broadcasters have been the object of concern for the Federal Communications Commission. In a 1946 internal Commission document, *Report on Public Service Responsibility of Broadcast Licensees*, public interest and local interest programming were identified as primary responsibilities of television broadcasters. However, no quantitative standards were established at that time. In 1961, the Commission adopted formal processing guidelines for license applications which included quantitative standards on such programming as commercial, local live, network, and public affairs. These delegations, as they were termed, were codified and published in *Delegations of Authority*, 43 FCC 2d 638 (1973), and in *Delegations of Authority*, 59 FCC 2d 491 (1976).[1] In the latter, two new categories were added to the extant delegations:

> In addition to the nonentertainment programming standard, the guidelines provide that applications proposing less than 5% local programming and less than 5% informational programming will be referred to the full Commission. The local guideline was added in recognition of the importance of every broadcast facility's function as a locally oriented transmission service. The informational guideline was meant to reaffirm the special contribution to an informed public opinion made by news and public affairs broadcasts.... Unaffiliated UHF stations are exempt from

[1] For a full historical account of these Commission actions as well as the appropriate citations see *Notice of Proposed Rule Making*, on MM Docket 83-670, 48 Fed. Reg. 37239 (August 17, 1983), at 37240-37242, (hereafter, "*Notice*").

the programming guidelines.[2]

While arguments were presented supporting the importance of both News & Public Affairs [NPA] and local programming, no reasons were cited as to why the Commission would expect broadcast markets to (in at least some instances) provide insufficient programming of these types.[3]

2. Since both Local and NPA programming are presumably of positive value to the viewer, a broadcaster would rationally provide both in order to maximize viewership. The need for Commission intervention in these regards must therefore rest implicitly, if not explicitly, on some presumption of market failure. A number of such market failures are possible. For example, the average viewer's valuation of these programming types might be less than that of society's, perhaps due to viewer tastes or ignorance. (We note, however, that such efforts to encourage additional provision of these fares could be easily thwarted by viewer censorship.) Alternatively, market power may exist to varying degrees across local markets, however, it has not been established that the exercise of such power would necessarily result in *less* public interest programming. None of these examples of market failure have been shown to be relevant in this industry. It is perhaps for this reason, *i.e.*, no apparent market failure, that elimination of the guidelines is presently being considered by the Commission. While the case for doing so may appear otherwise sound, it is still important to consider the analytical aspects of the issue so as to permit the Commission to make a more informed and justifiable decision.

3. Accordingly, this study was undertaken for the purpose of better understanding and thereby accurately predicting the public interest programming choices made by commercial TV broadcasters under various conditions. This is accomplished by first formulating a theoretical model of the typical broadcaster's programming decision-making, and then using that as a basis for empirically determining the relative importance of various factors, including the Commission's programming guidelines. Several alternative estimations are performed using 1980 data on 594 broadcast stations, of which 44 are UHF-independent stations. It is the latter subset of guideline-exempt stations which permits the empirical determinations that: (1) the 5% guideline on local programming has a small (but statistically significant) positive impact on the provision of such fare, and (2) the 5% NPA guideline is statistically insignificant in its influence on the provision of news and public affairs programming. Furthermore, the research allows one to predict that the complete

[2] *Id.*, at 37240.

[3] In fact, the Commission found that for 1973 data, the newly established guidelines were being met by 93% of all VHF affiliates, 83% of all VHF independents, and 78% of all UHF affiliates. (*Id.*, at 37240).

elimination of the guidelines will create virtually no danger that either of these programming quantities will fall below the current 5% standard.

4. The remainder of this paper is organized as follows: Section II will provide background information on the commercial television broadcasting industry, as well as develop a theoretical framework which is descriptive of the typical broadcaster's decision-making process with regard to public interest programming. In Section III, a general regression equation will be formulated for both Local and NPA programming, as functions of several independent variables which are descriptive of the firm or its market. The remainder of that section will present and contrast the results of several alternative specifications of the regression equation, as well as discuss the robustness and confidence that can be attached to these results. Finally, in Section IV, the policy implications of the previous section are evaluated with regard to the guidelines, economies of scale, and the role of competition.

II. Background

A. Industry Structure and Performance

5. The commercial television broadcast industry is one which has been characterized by substantial growth in the last three decades. In 1955, there were 439 commercial stations, 294 VHF and 117 UHF.[4] As of April 1984, there were 537 VHF, 347 UHF and 884 total broadcast licenses (excluding 272 low power outlets), according to Commission reports. For the 1980 sample employed in this paper, there are 434 VHF and 160 UHF outlets. Out of the total of 594 stations, only 65 are independents while 44 are UHF-independents.

6. With regard to public interest programming, the national averages of Local and NPA programming for all 663 commercial stations in 1979 were 10.1% and 13.9%. These values are well above the Commission's 5% guideline for each.[5] For the 1980 data sample used in this paper, the corresponding Local and NPA figures were 9.5% and 15.3%, which differ from the 1979 figures (cited above) primarily due to the omission of 29 specialty (e.g., religious) stations from the sampling. Indeed, there is relatively little volatility in these national averages in the 1973-1979 period, with local programming varying between 9.9% and 10.6% and NPA varying 13.0% to 14.5%.[6]

7. Upon disaggregating these stations into sub-categories, one sees patterns which are of particular interest. With regard to Local programming, network affiliates generally provide less than independent stations, while on average, VHF's provide more than UHF's. This pattern is

[4] *See Notice* at 37251.

[5] *Id.* at 37252.

[6] *Id.* at 37254.

changed somewhat for NPA programming, where network affiliates provide more than independents, although VHF's provide more than UHF's.

8. With regard to compliance of stations with the programming guidelines, Table I presents 1980 frequency data by type of stations according to percent of broadcast time devoted to public interest programming. Since this was a composite-week sampling (*i.e.*, one Monday, Tuesday, *etc.* taken randomly during the year), the variances of the frequency distributions can be expected to be higher than for comparable distributions of *annual* averages, hence, it probably depicts an exaggeration of the incidence of guideline violations. Such violations occurred in 6.5% of all stations for Local Programming and in less than 1% for NPA. Of the 97 stations which were UHF independents (and hence exempt) at least 30% were below the 5% guideline in each category. Note that all station types were above guidelines on average, though the margin of excess (over the 5%) varied from a low of 1.9% for UHF network stations providing Local programming to a high of 11.8% for VHF network stations providing NPA.

TABLE I

1980 Frequency Distribution of Local and NPA Programming by Type of Station[1]

	Local Programming				*News and Public Affairs*			
% of	*Type of Station*				*Type of Station*			
Broadcast Time	*VHF Net*	*VHF Ind*	*UHF Net*	*UHF Ind*	*VHF Net*	*VHF Ind*	*UHF Net*	*UHF Ind*
0-5%	5.3	6.5	16.0	30.9	0.2	6.5	1.6	33.0
5-10%	53.1	32.3	74.4	30.9	1.4	54.8	2.4	41.2
10-15%	30.2	25.8	8.0	14.4	28.3	32.3	56.8	14.4
15-20%	9.5	12.9	1.6	8.2	54.8	6.5	37.6	8.2
20-25%	1.6	6.5	0	4.1	14.4	0	1.6	0
>25%	0.2	16.1	0	11.3	0.9	0	0	3.1
Mean[2]	10.2	15.3	6.9	12.8	16.8	8.8	14.4	8.1
Number of Violations[3]	23	2	20	(30)	1	2	2	(32)
Total Stations	431	31	125	97	431	31	125	97

[1] Source: Programming data supplied by broadcast licensees on FCC Form 303-A for 1980.

[2] These calculations were performed on an incomplete sampling of the data used in the remainder of the table, (*i.e.*, 570 out of 684 observations) due to a random computer omission.

[3] UHF independent stations cannot technically violate the guideline since they are exempt.

B. Broadcasters' Programming Decision-making

9. Like any other firm, a broadcaster seeks to maximize its present and future profits. Any decision variable, such as entertainment programming, quality of picture or sound, locally-oriented programming, or NPA, will be chosen so as to maximize profits (by equating the marginal return to the marginal cost of the last unit). Presumably, each of the above variables will boost viewership and hence, advertising revenues, but of course will do so only at a cost. In addition, public interest programming such as local and NPA directly affects the probability of winning license renewal, and so is likely to receive an added emphasis in the broadcaster's decision-making.

10. Theoretically, a broadcaster can be assumed to face a simple (undiscounted) time stream of profits:

$$[R_0(x,y) - C_0(x,y)]$$
$$+u_1(y)[R_1(x,y) - C_1(x,y)]$$
$$+ \ldots + u_n(y)[R_n(x,y) - C_n(x,y)]$$

where the R_i represents advertising revenue in the ith period and C_i represents the associated level of total cost, where both R_i and C_i are functions of the decision variables, x and y. While x is comparable to such decisions as the mix of entertainment programming, the holding of promotional contests, and the quality of the video or aural signal, y can represent such attributes as the quantities of local, NPA, and childrens' programming which not only would affect profit but would contribute to u_i, the probability of gaining renewal for the ith period. Simplifying the above profit stream expression to

$$\pi = \pi_0 + u_1\pi_1 + \ldots + u_n\pi_n$$

and performing a maximization with respect to x and y, one obtains first-order conditions

$$\frac{a\pi}{ax} = \frac{a\pi_0}{ax} + u_1\frac{a\pi_1}{ax} + \ldots + u_n\frac{a\pi_n}{ax} = 0$$

$$\frac{a\pi}{ay} = \frac{a\pi_0}{ay} + u_1\frac{a\pi_1}{ay}$$

$$+ \ldots + u_n\frac{a\pi_n}{ay} + \pi_1\frac{au_1}{ay} + \ldots \pi_n\frac{au_n}{ay} = 0.$$

Solving these equations simultaneously yields the profit-maximizing levels of both x and y. It can be easily verified using the traditional second-order conditions for this maximization and the assumption that y contributes positively to renewal probability (*i.e.*, $\frac{a\mu}{a\gamma}>0$), that while the

broadcaster will rationally choose x so that the marginal revenue equals marginal cost on the last unit, the regulated attribute y will be chosen such that the marginal cost of the last unit is greater than the marginal revenue. Not surprisingly, the regulation effectively brings about a provision of y above that which would otherwise maximize profit.

11. In extending this abstract theory to a model to be empirically estimated, one needs first to identify all "exogenous" firm, market and regulatory factors which contribute to revenue, cost or the renewal probability. (These factors or variables are exogenous and not endogenous in the sense that they are not determined by the broadcaster as were x and y in the above example.) Examples of appropriate firm and market variables which are exogenous are UHF/VHF status and size of the local market, respectively. Upon determining those exogenous variables which seem relevant (and for which reliable data exists), individuals regressions are then performed on each of the endogenous variables under study, in this case, the amounts of local and NPA programming. The results can then be utilized to not only ascertain which factors are in fact influential in the broadcaster's programming decisions, but also to predict the broadcaster's response to an altered regulatory environment.

III. The Empirical Study

A. The Model and the Data

12. One of the first tasks in performing an empirical study such as this is to identify those exogenous variables which can be expected to be influential in the determination of the endogenous variables of interest. The absence (or unreliability) of data for some variables can then impose restrictions on the number of variables employed and the number of observations, thereby potentially reducing the significance of the results.

13. In general, the amounts of local programming (LOCPROG) and News and Public Affairs (NEWSPUBA) provided by a given station are hypothesized to be functions of the following variables:

MKTNWC	= largest net weekly circulation in the market of the station (in 1000's of TV households)
NLOCSTN	= number of stations in the local market
NCOMPSTN	= number of competing stations (local plus distant signals)
UHFDUM	= dummy variable (VHF = 0; UHF = 1)
INDDUM	= dummy variable (network affiliate = 0; independent = 1)
GUIDEDUM	= UHFDUM * INDDUM = dummy variable (UHF independent =1; otherwise = 0)
STNREV	= station revenue (in $1000).

The dependent variables, LOCPROG and NEWSPUBA, are measured in terms of percent of total broadcast time (6AM to midnight) for each of the 594 stations in this cross-section sampling. The exact definitions of these

programming categories are found on the FCC reporting form (#303-A) from which the two data sets were obtained. Specifically, each category is described as follows:

> *A Local Program* is any program originated or produced by the station, or for the production of which the station is primarily responsible, employing live talent more than 50% of the time. Such a program, taped, recorded or filmed for later broadcast shall be classified as local. A local program fed to a network shall be classified by the originating station as local. All non-network and non-syndicated news programs may be classified as local. Programs primarily featuring syndicated or feature films, or other non-locally recorded programs shall not be classified as local, even though a station personality appears in connection with such material. However, identifiable units of such programs which are live and separately logged as such may be classified as local (e.g., if during the course of a feature film program a non-network 2-minute news report is given and logged as a news program, the report may be classified as local).
>
> *News* includes reports dealing with current local, national and international events, including weather and stock market reports, and commentary, analysis, or sports news when they are integral part of a news program.
>
> *Public Affairs Programs* are programs dealing with local, state, regional, national or international issues or problems, including, but not limited to, talks, commentaries, discussions, speeches, editorials, political programs, documentaries, mini-documentaries, panels, roundtables and vignettes, and extended coverage (whether live or recorded) or public events or proceedings, such as local council meetings, congressional hearings and the like.[7]

The 594 observations were drawn from the 48 continental states (plus Anchorage, AK), and excluded subscription stations, satellite stations, and stations which were on-air only part of the year or for which financial reports were delinquent. The delineation of the "local market" for each observation (station) conformed for the most part with the Arbitron classification of television markets.[8]

14. The independent variable, MKTNWC, is included as an explanatory variable of the regression as a proxy for size of market in terms of potential viewing population. Several rationales for this inclusion can be cited, including simple casual empiricism that more of this programming seems to occur in larger markets. Alternatively, it can be hypothesized that there are more opportunities (if not interest as well) for local entertainment, local news, and local public affairs programming in large as opposed to small broadcasting markets. The actual measure for market size chosen was the largest net weekly circulation figure of all stations in the local market; this is effectively the total number of television households which view the most popular station for at least 5 minutes in a given week.

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[7] *See* FCC *1980 Annual Programming Report*, Form #303-A, October 1980.

[8] *See* Arbitron's *1980-81 Television Markets and Rankings Guide.*

15. The next two variables, the number of local stations (NLOCSTN) and the number of competing stations (NCOMPSTN), are alternative measures of commercial television competition where the latter differs from the former by the number of distant signals which are significantly viewed. In particular, a station was counted as a competing station if its net weekly circulation in the observation station's home county constituted 50% or more of all television households of that county.[9]

16. Dummy variables are used to distinguish UHF from VHF stations (with UHFDUM) and to distinguish network affiliated stations from independents (with INDDUM). In addition, a third dummy, GUIDEDUM, is introduced to distinguish independent UHF stations from those stations which are subject to public interest programming guidelines. It is this latter variable which allows determinations of the efficacy of these regulations.

17. Finally, the variable, station revenue (STNREV), serves as a proxy for scale of public interest programming activity, or, alternatively, for size of the broadcasting firm. The inclusion of this proxy is justified *a priori* because of the expectations (1) that unit costs of producing such material would decline with the quantity produced and broadcasted, or (2) that such programming (to be of good quality) would require large fixed costs which are best afforded by larger stations.[10]

B. Version I

18. The primary specification (Version I) of the regression equations for both LOCPROG and NEWSPUBA has the general form:[11]

$$a + b * \ln(MKTNWC) + c * NLOCSTN + d * NCOMPSTN + e * UHFDUM + f * INDDUM + g * GUIDEDUM + h * \ln(STNREV) + u.$$

Upon performing an ordinary least squares estimation, the following result is obtained for local programming:

$$\begin{aligned} LOCPROG = &- 7.61 + \underset{(2.25)}{0.716} * \ln(MKTNWC) \\ &- \underset{(0.19)}{0.0317} * NLOCSTN \\ &+ \underset{(2.45)}{0.342} * NCOMPSTN \end{aligned}$$

[9] For data source of NLOCSTN, see Arbitron's *1980-81 Television Markets and Rankings Guide.* In addition, for data source of NCOMPSTN, see Arbitron's *1980 County Coverage Report,* (except Georgia observations which used 1979 report).

[10] Admittedly, a potential econometric problem arises in utilizing this proxy as an exogenous variable, as is discussed and analyzed more extensively below in the presentations of Versions II and III of the estimation.

[11] The natural logs of MKTNWC and STNREV were used due to the *a priori* expectation that the marginal influence of each variable would decline with the magnitude of each. This was given support upon regressing the alternative specifications (with and without logs) and comparing the results.

$$- \underset{(3.13)}{1.23} * \text{UHFDUM}$$

$$- \underset{(0.42)}{0.346} * \text{INDDUM}$$

$$- \underset{(2.08)}{2.03} * \text{GUIDEDUM}$$

$$+ \underset{(4.99)}{1.445} * \ln(\text{STNREV})$$

$[R^2 = 0.40;\ F = 58.2;\ \text{mean} = 9.52;\ \text{S.E.} = 3.33]$

Note that t-statistics are reported in parentheses beneath their respective coefficients. The t-statistics for the NLOCSTN and INDDUM coefficients suggest that the two are not statistically different from zero. Re-estimating the equation without NLOCSTN, but retaining INDDUM[12] yields:

$$\text{LOCPROG} = -7.49 + \underset{(2.35)}{0.693} * \ln(\text{MKTNWC})$$

$$+ \underset{(3.04)}{0.325} * \text{NCOMPSTN}$$

$$- \underset{(3.15)}{1.23} * \text{UHFDUM}$$

$$- \underset{(0.45)}{0.367} * \text{INDDUM}$$

$$- \underset{(2.07)}{2.02} * \text{GUIDEDUM}$$

$$+ \underset{(5.00)}{1.44} * \ln(\text{STNREV})$$

$[R^2 = 0.40;\ F = 68.0;\ \text{mean} = 9.52;\ \text{S.E.} = 3.33]$

Note that all coefficients are of the expected sign and (except for INDDUM), are significantly different from zero to a 2.5% level.

19. Repeating the same procedure for news and public affairs, one obtains

$$\text{NEWSPUBA} = +5.77 - \underset{(0.70)}{0.160} * \ln(\text{MKTNWC})$$

$$+ \underset{(0.38)}{0.0450} * \text{NLOCSTN}$$

$$+ \underset{(2.15)}{0.215} * \text{NCOMPSTN}$$

$$- \underset{(3.11)}{0.877} * \text{UHFDUM}$$

$$- \underset{(16.96)}{9.92} * \text{INDDUM}$$

$$- \underset{(0.35)}{0.248} * \text{GUIDEDUM}$$

[12] The omission of INDDUM changes the magnitude of the GUIDEDUM coefficient by an amount (approximately 0.32) comparable to the INDDUM coefficient. Since GUIDEDUM is the interaction of UHFDUM and INDDUM and since GUIDEDUM and INDDUM are highly correlated, this is not surprising. For these reasons, INDDUM is not omitted in this re-estimation.

$$+ 1.27 \underset{(6.14)}{} * \ln(STNREV)$$

$[R^2 = 0.67; F = 176.3; mean = 15.26; S.E. = 2.39]$

One cannot reject the hypothesis that the coefficients of ln(MKTNWC), NLOLCSTN and GUIDEDUM are (each) equal to zero at even a 10% level of significance.

20. Upon re-estimating the above equation without these variables, one obtains:

$$NEWSPUBA = + 5.75 + \underset{(3.15)}{0.233} * NCOMPSTN - \underset{(3.72)}{0.960} * UHFDUM - \underset{(27.97)}{10.14} * INDDUM + \underset{(9.86)}{1.18} * \ln(STNREV)$$

$[R^2 = 0.68; F = 309.5; mean = 15.26; S.E. = 2.38]$

Note that while the independent dummy and the UHF dummy variables are respectively the most and the third most significant explanatory variables, the guidelines dummy (which is the interaction of these two) proves to be not statistically significant in the estimation. Hence, the guidelines, while exerting some influence on local programming, have virtually no discernible impact on news and public affairs.

C. Version II

21. The use of station revenue proxy for scale in order to account for economies of scale may potentially introduce an econometric methodological error. While STNREV is being treated as an exogenous variable in the determination of LOCPROG and NEWSPUBA, it is in fact endogenously determined to varying extents by all of the other variables in the two regression equations.[13]

22. One solution to this problem is to simply delete the variable STNREV from the regression. Doing so for local programming yields:

$$LOCPROG = - 2.17 + \underset{(8.32)}{1.86} * \ln(MKTNWC) + \underset{(0.22)}{0.0374} * NLOCSTN + \underset{(2.52)}{0.359} * NCOMPSTN - \underset{(5.62)}{2.05} * UHFDUM$$

[13] For the purpose of investigating the efficacy of the guidelines, this issue may not be a serious problem, since upon regressing STNREV on all other variables, the coefficient of GUIDEDUM was not found to be statistically different from zero. This indication is borne out by the results of the Version II and III estimations.

$$- 0.651 \underset{(0.78)}{} * \text{INDDUM}$$

$$- 2.63 \underset{(2.66)}{} * \text{GUIDEDUM}$$

$$[R^2 = 0.38; F = 61.2; \text{mean} = 9.52; \text{S.E.} = 3.40]$$

Upon eliminating NLOCSTN, none of the coefficients reported above change appreciably, although the t-statistics on NCOMPSTN and ln(MKTNWC) both increase in magnitude by about one third. In either regression form, the GUIDEDUM coefficient is now significant at a .005% level.

23. Estimating news and public affairs without STNREV yields:

$$\text{NEWSPUBA} = + 10.56 + 0.851 \underset{(5.25)}{} * \ln(\text{MKTNWC})$$

$$+ 0.106 \underset{(0.86)}{} * \text{NLOCSTN}$$

$$+ 0.230 \underset{(2.23)}{} * \text{NCOMPSTN}$$

$$- 1.60 \underset{(6.05)}{} * \text{UHFDUM}$$

$$- 10.18 \underset{(16.95)}{} * \text{INDDUM}$$

$$- 0.778 \underset{(1.09)}{} * \text{GUIDEDUM}$$

$$[R^2 = 0.65; F = 187.6; \text{mean} = 15.26; \text{S.E.} = 2.46]$$

Upon eliminating NLOCSTN from the estimation, the coefficient of GUIDEDUM becomes -0.829 with a standard error of 0.71. This implies that the coefficient is significantly different from zero only at a level of 12.5%.

24. Therefore, in estimating Version II of the regression specification, one finds that the Commission guidelines are indicated to be somewhat more effective in both local and NPA programming relative to the results obtained in the Version I estimation.

D. Version III

25. The solution to the simultaneity problem of Version I which was incorporated into the latest version could potentially contribute to yet another econometric problem, that of an omitted variable. For example, if scale were a significant variable in these estimations, its omission could bias the coefficient of any exogenous variable with which it is correlated.[14] Accordingly, an alternative approach to overcoming the potential simultaneity problem of Version I will be described here. This involves: (1) regressing ln(STNREV) on all exogenous variables, (2) calculating predicted values of ln(STNREV) for each observation, (3) defining and

[14] See Kmenta, J., *Elements of Econometrics*, (New York: The MacMillan Co., 1971), pg. 393.

calculating a new variable, INSLREV, to be the difference of the actual and predicted ln(STNREV), and (4) employing INSLREV as a proxy for "scale" in the LOCPROG and NEWSPUBA regressions. This approach reduces the simultaneity problem as well as any multicollinearity among the explanatory variables, since INSLREV is by construction uncorrelated with these other variables.

26. The estimation of local programming employing the proxy variable, INSLREV, results in:

$$\begin{aligned} \text{LOCPROG} = {} & + 0.642 \\ & + \underset{(4.23)}{1.22} * \ln(\text{MKTNWC}) \\ & + \underset{(1.80)}{0.339} * \text{NLOCSTN} \\ & + \underset{(2.28)}{0.322} * \text{NCOMPSTN} \\ & - \underset{(5.96)}{2.16} * \text{UHFDUM} \\ & - \underset{(0.70)}{0.579} * \text{INDDUM} \\ & - \underset{(2.52)}{2.47} * \text{GUIDEDUM} \\ & + \underset{(3.46)}{0.956} * \text{INSLREV} \end{aligned}$$

$[R^2 = 0.39; F = 55.2; \text{mean} = 9.52; \text{S.E.} = 3.37]$

Both the coefficients and the associated econometric statistics in this version are for the most part intermediate between those obtained in the two previous versions.

27. The estimation of NPA using Version III's specification yields:

$$\begin{aligned} \text{NEWSPUBA} = {} & + 13.29 \\ & + \underset{(1.10)}{0.229} * \ln(\text{MKTNWC}) \\ & + \underset{(2.94)}{0.399} * \text{NLOCSTN} \\ & + \underset{(1.91)}{0.194} * \text{NCOMPSTN} \\ & - \underset{(6.55)}{1.71} * \text{UHFDUM} \\ & - \underset{(17.12)}{10.11} * \text{INDDUM} \\ & - \underset{(0.89)}{0.624} * \text{GUIDEDUM} \\ & + \underset{(4.68)}{0.928} * \text{INSLREV} \end{aligned}$$

$[R^2 = 0.67; F = 169.7; \text{mean} = 15.26; \text{S.E.} = 2.42]$

Once again the results obtained in this version appear to be for the most part intermediate between those of the previous two versions.

E. Robustness of Results

28. From the above estimations, it would appear that the potential simultaneity problem of Version I and the potential "omitted variable"

problem of Version II do not appear in retrospect to deserve much concern. Predictions and policy implications based on these three versions can be expected to be roughly comparable. Furthermore, even upon expanding the data set to include 29 specialty stations (e.g., religious), the results were not appreciably different. Upon revising the local programming regression of Version I to exclude NLOCSTN but include a new dummy variable for these specialty stations, the new coefficient on GUIDEDUM was -2.24 with a t-value of 1.76. This compares with the -2.02 coefficient and 2.07 t-statistic obtained originally with the smaller data set.

IV. Policy Implications of Empirical Study

A. The Efficacy of Commission Guidelines

29. All of the regressions, when taken together, suggest that the guidelines: (1) contribute about 2 percentage points to the average (non-exempt) station's level of 9.8% local programming, and (2) have little if any significant impact on the level of news and public affairs programming aired. The elimination of the guidelines (for the approximately) 90% of industry broadcasters who are currently non-exempt can be predicted to result in industry averages (including specialty stations) of about 7.5-8% Local programming and 15% News and Public Affairs. Both of these are appreciably above the 5% levels specified by the guidelines.

B. Scale Economies

30. A formal econometric test for scale economies is not possible without production or cost data which were not available. However, to the extent that station revenue is a reliable proxy for scale, the regressions are supportive of the expectation that such economies exist and are significant for these types of programming.

31. Assuming that such economies do indeed exist, the Commission's programming guidelines impose costs on small and/or entering non-exempt broadcasters which are disproportionately high relative to the stations' larger (or exempt) rivals. Accordingly, the elimination of the guidelines could potentially result in more stations on-air, and would certainly allow small (non-exempt) broadcasters the option of investing in other activities which are more competitively effective. While this is somewhat more than mere speculation, it is not possible on the basis of this study to even estimate the benefits of this deregulatory action.

32. Furthermore, due to the strong significance of revenue (*i.e.*, station size) as a determinant for each of these programming types, it becomes likely that any policy (for example, the awarding of low power TV licenses) which increases the number of small broadcasters will also lower the average market performance in these regards. This is so, even

though total broadcast time of these programming types will increase for the market.

C. The Role of Competition

33. This study strongly supports the contention that competition exists among rival stations in the provision of public interest programming. However, the marginal contribution of one more station in a market to the average provision of such local and NPA in that market is less than ½ of one percentage point for both programming types; this is true for all alternative specifications estimated. Another conclusion of this research is that the total number of competing stations (and not just the number of local signals) appears to be the relevant competition measure for programming. In all but Version III of the NPA estimation, NLOCSTN is overshadowed in significance by NCOMPSTN. Accordingly, a broad definition of the market seems not only justified but appropriate in addressing these particular performance aspects of the broadcaster.

D. Market Size

34. While this market characteristic is closely correlated with that of competition (discussed above), the regressions indicate that potential audience size is still an important determinant of the amount of local programming aired. This is not the case for NPA.[15] The fact that small markets can be predicted to have less local programming may not be a serious policy concern, since such markets might be rationally expected to have less local issues or talent on which to focus.

E. Network Affiliation

35. Finally, it is apparent from this study that the status of being an unaffiliated or independent broadcaster reduces the predicted level of local programming only slightly but reduces the level of NPA greatly. Therefore, any developments which promote the establishment of a viable fourth ajor network can be expected to have a favorable and significant impact on the broadcasting industry's provision of NPA.

STATEMENT OF CHAIRMAN MARK S. FOWLER

RE: Deregulation of Commercial Television

Today's decision removes an unnecessary layer of government involvement in the television program decisions of the American people. As the record shows, there is no need for rigid guidelines on commercial time limits and formalistic ascertainment procedures. We've done away with program log required in the past only for the most theoretical purposes. And we've struck down requirements for certain categories of programs

[15] The sole exception occurs when MKTNWC reflects the influence of the ommitted variable STNREV in Version II.

that may have been aired only because, in the past, the FCC said they had to be.

All of this is good news for the American public . . . except possibly for pulp producers, who may see a decline in TV station demand for the reams of paper previously filled out at the government's request.

What's really at issue here is whether the government trusts the common man to make up his own mind about what to watch or not to watch. If a half-hour TV shop-at-home service is an annoyance, he will choose to watch — or do — something else. If a news documentary has an appeal, he'll watch it. Neither the commercial broadcaster, nor his customer, the general public, needs the FCC to make program choices for him.

The character of television won't change by leaps and bounds by today's decision. But the way America chooses to regulate has become imminently more rational by what we do today.

STATEMENT OF COMMISSIONER HENRY M. RIVERA CONCURRING IN PART, DISSENTING IN PART

RE: Report and Order Revising Commercial Television Licensing Policies

When the Commission issued the Notice of Proposed Rulemaking in this proceeding,[1] I expressed strong reservations about several of the reasons given for launching this regulatory review.[2] I am pleased that this *Report and Order* abandons the deregulatory rationales I found objectionable.[3] Doing so has forced the Commission to focus closely on the actual performance of the over-the-air television broadcast system, and this close study allows us responsibly to conclude that the regulations eliminated by this decision are unnecessary to protect the public interest.[4]

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[1] *Notice of Proposed Rulemaking to Revise Commercial Television Licensing Policies*, 94 FCC 2d 678 (1983) (*NPRM*).

[2] *Concurring Statement of Commissioner Henry M. Rivera, supra*, 94 FCC 2d at 721-27. I found unconvincing the argument that the Commission could rely on competition from new media in the video marketplace to safeguard the public interest in responsive programming, since the new media are not available nationwide. *Id.* at 721-25. I was also wholly unpersuaded by the claim that these regulations should be discarded because they place broadcasters at a disadvantage vis-a-vis the new video services. *Id.* at 725. After all, there can be no competitive disadvantage accruing from unborn competition and the cable industry, the principal alternative to over-the-air television, is often more extensively regulated by local municipalities than broadcasters are by the FCC.

[3] The *Report and Order* admits that most of the new competition adverted to in the NPRM is "just beginning to assert" itself and that the impact of this nascent competition is difficult to predict. Paras. 20-21. It contains no reference whatever to the level playing field rationale previously advanced.

[4] Although I harbored doubts about the reasons given for starting this proceeding, I was not convinced that the regulations under review were necessary to advance the public

Frankly, although this proceeding is commonly referred to as "television deregulation," I do not think our actions are especially deregulatory[5] — nor could they be, as long as television remains a medium pervaded by structural scarcity. In reality, our decision changes very little of substance. The bedrock public interest obligation of broadcasters to serve the needs and interests of their communities of license still exists.[6] The primary change being made is the way we will measure compliance with this obligation. The key to the effectiveness of this revised scheme will be, as before, a sincere commitment by the FCC to police broadcasters' compliance with their substantive obligations. That sincere commitment, not the paperwork we eliminate here, is what is needed to maintain an accountable system. The requirements we retain generally give us the necessary tools to do our job properly, if we are committed to the task.

Except for the Commission's continuing inaction with regard to children's television programming, *see infra* pp. 11-14, I am persuaded that our decision in this proceeding will not put the public interest in jeopardy. While I do not completely subscribe to the analysis advanced by the *Report and Order*[7], the assembled evidence convinces me that the public can expect a continued healthy supply of non-entertainment programming and non-abusive levels of commercialization absent FCC processing guidelines. I also believe the quarterly issue-programs lists will allow the Commission and the general public to ensure that every television station remains publicly accountable, at least to the extent they are now.

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interest in a responsive and accountable television broadcast system. My initial view was that it might be possible to further this objective through more finely tuned administrative tools. 94 FCC 2d at 726. Our actions here are, in the main, procedural fine tuning. I said then, and I continue to believe, that any revised regulatory framework will have to: (1) assure that television stations continue to be subject to binding and enforceable public service obligations, consistent with their status as public trustees; (2) retain rational procedures to measure a licensee's rendition of these public obligations; and (3) preserve the public's opportunity to participate meaningfully in our licensing decisions. *Id.* at 721-22.

[5] That is no doubt why the unadopted "statutory option" proposed in this proceeding continues to draw attention from hopeful deregulators, *see Report and Order* para. 7, and why efforts to narrow the ambit of statutory obligations continue. *See generally Fairness Doctrine Notice of Inquiry*, 49 Fed. Reg. 20317 (May 14, 1984).

[6] My fellow commissioners are apparently inclined to chip away at this bedrock by downgrading it here to a mere "obligation." *See Report and Order* paras. 3, 23, 29, 32, 54. Regardless of how this core public interest programming requirement may be described, however, the Commission's discretion to eliminate it altogether is statutorily foreclosed. *See UCC* v. *FCC*, 707 F.2d 1413, 1427-1430 (D.C. Cir. 1983).

[7] For example, I disagree with the suggestion that these regulations should be repealed simply because they are costly or allegedly raise First Amendment concerns. *See Report and Order* paras. 25-30.

Turning to the specifics of this decision, the evidence before us regarding adult-oriented non-entertainment programming establishes that commercial incentives rather than FCC guidelines spur broadcasters to provide such service, and that licensees in markets of all sizes will continue to provide an acceptable amount of informational and other similar programs absent our guidelines. I recognize that reasonable people may differ on these points[8] and that, at first blush, identical regulatory schemes for radio and television would seem unjustified in view of the quantum difference between the number of competitors in the two industries.[9] Initially, however, it bears emphasizing that although we are conforming the procedural rules governing television and radio licensees, the substantive requirements of the average radio and television licensee differ considerably. As described more fully below, pp. 9-11, television stations remain far more restricted in their discretion to specialize than their counterparts in radio. In addition, the degree to which most broadcasters are surpassing our informational, local and other non-entertainment program guidelines strongly suggests that this performance is generally due to economic self interest, not FCC processing guidelines.[10] By eliminating the guidelines, we are not saying that commercial television licensees are no longer required to air programming that responds to the needs and interests of the local community. We are simply choosing to deemphasize these benchmarks as monitoring devices because we are confident, based on the data, that from a strictly quantitative standpoint the system is functioning acceptably and will continue to do so.[11]

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[8] In fact, I was initially skeptical that statistics on licensee performance in a regulated environment could be probative of licensees' likely performance absent regulation. 94 FCC 2d at 725 n.25. Close examination of the evidence has put a new light on the matter.

[9] *See* 94 FCC 2d at 724.

[10] Some broadcasters do not meet current programming guidelines; however, the overwhelming majority far exceeds them in markets of all sizes. *See* Comments of the National Association of Broadcasters in MM Docket No. 83-670, Appendix B — NAB Television Programming Study, filed November 21, 1983. This is not entirely surprising since television is the dominant information provider and since informational programming, especially news, is a profitable business. In any event, viewing the statistics complied in this proceeding, it is difficult to conclude that the public's overall access to issue-oriented and other non-entertainment programs on television will be impaired by this decision.

[11] When the FCC established the processing guidelines under review, it set them at a level at which most licenses were performing, rather than at a level of performance at which the public interest was theoretically optimized. However, insofar as the guidelines can be said to represent a level at which the system as a whole functioned acceptably, that level of acceptable performance will continue because: (1) there are more television licenses on the air now than there were in 1976; (2) the record shows that most licensees in markets of all sizes are airing substantially more informational and other non-entertainment

The issue of whether to retain a formal ascertainment procedure is a somewhat closer question. The ascertainment primers were adopted largely at the behest of broadcasters and broadcast lawyers in search of security in the licensing process. If broadcasters no longer want the safe harbor provided by the primer — and the record in this docket establishes that they do not[12] — there would have to be a very good reason for the FCC to insist upon it. While not without detractors, the primer does have its virtues. First, it provides an objective (if imperfect) framework within which to evaluate performance at renewal time. Second, some public interest advocates have argued that formal ascertainment is needed to guarantee broadcaster sensitivity to the programming needs of groups having limited economic resources. With regard to the first point, I am persuaded that the quarterly issues-programs lists can serve as well as the primer in providing evidence of a broadcaster's awareness of and attention to its community, without the undue formalisms of the primer.[13] As for the second point, if I believed that ascertainment in accordance with existing FCC guidelines assured programming responsive to all strongly felt needs, I would readily oppose repeal of those guidelines. However, broadcasters necessarily have broad discretion in deciding what programs to air and what local needs to address; and it is impossible to assure programming responsive to all local needs and interests simply by requiring broadcasters to ascertain according to a prescribed formula.[14] That being the case, retention of the ascertainment primers does not

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programming than the FCC's guidelines; and therefore, (3) viewers have access to more of this programming than before. *See* Appendix B to NAB Comments.

[12] *See Report and Order,* Appendix B, paras. 42-52.

[13] A number of questions remain regarding the role of these lists in renewal cases. For example, the Commission has not described the standard to be used to evaluate the relationship between the issues a licensee singles out and the programs listed as responsive to those issues. Obviously, there must be a demonstrable relationship if the list is to serve its intended function. *See UCC* v. *FCC,* 707 F.2d at 1437. Similarly, how will a licensee show that its issue-responsive programming is sufficient to withstand a challenge? I agree that these questions can be answered on an *ad hoc* basis, but until this body of precedent has developed our failure to detail the mechanics of the process will disadvantage both the public and licensees. Nonetheless, our decision does provide some important guidance: (1) the issues-programs list will be the most significant vehicle for recording efforts to fulfill the bedrock programming responsibility; (2) licensees must adequately document their issue-responsive programming; (3) the lists will serve as an initial frame of reference by the Commission to evaluate programming issues raised in a petition to deny or comparative renewal; (4) if the lists are insufficient to resolve a substantial question, the Commission can ask the licensee for more information; and, most importantly, (5) the licensee bears the burden of proving that it has met the bedrock duty to air issue-responsive programming. *Report and Order* paras. 76-77.

[14] Citizens' groups and the judiciary have, in fact, complained about the inadequacy of formal ascertainment as a measure of licensee performance and as a public interest spur. *See Alianza Federal de Mercedes* v. *FCC,* 539 F.2d 732, 736 (D.C. Cir. 1976).

appear warranted and I concur in their elimination.[15]

For many of the same reasons, I can support the repeal of the logging duty. The FCC requires program logs primarily to determine how much non-entertainment programming each broadcaster is airing. If logging helped to assure adequate attention to community needs or an effective comparative renewal standard, these benefits would plainly outweigh the costs imposed and I would object to elimination of the program log requirement. From what I can gather, however, logging does neither. Failure to meet the Commission's processing guidelines (which is revealed by scrutiny of logs) does not prevent renewal and satisfaction of them does not assure renewal. More than that, the new quarterly issues-programs list may be a superior gauge of a broadcaster's programming because a licensee will have to account for its public interest performance more precisely than it does under a system of rote logging.[16]

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[15] The *Report and Order's* comment that the ascertainment requirement is being completely eliminated, *see* paras. 47 and 54, overstates the action being taken and should not lull licensees into a false security. All broadcasters remain responsible for seeing to it that all significant issues are addressed and for airing issue-responsive programming; therefore, *a fortiori* they will have to ascertain local programming needs to meet those requirements. *Cf. Committee for Community Access* v. *FCC*, No. 82-2314, slip op. at 6-7 (D.C. Cir. July 15, 1984). They would also be well advised to document their reasons for covering some issues but not others to guard against renewal challenges. The *Report and Order* indicates that "[i]f the programming presented by the licensee satisfies its obligation, the ascertainment efforts of the station are irrelevant." Para. 54. In other words, if confronted by evidence that a licensee has ignored a significant need or has failed to provide adequate issue-responsive programming the station would bear the burden of showing that its programming decisions were reasonable, and its ascertainment of local needs would be material to this issue. In this respect, our action is closer to Option II than Option I as specified in the NPRM. *See also* para. 39 ("Assessing the reasonableness of a licensee's decision [in a comparative challenge] will necessitate an ad hoc review to examine the circumstances in which the programming decision was made. The examination will focus on the licensee's evaluation of the programming of other television stations and on its own responsive programming in light of the needs of the community.") As we said in the radio deregulation proceeding: "[W]hat is important is that licensees utilize their good faith discretion in determining the type of programming that they will offer and the issues to which they will be responsive. It would be inconsistent with the exercise of good faith judgment for a broadcaster to be 'walled off' from its community. Rather, broadcasters should maintain contact with their community on a personal basis.... What is not important is that each licensee follow the same requirements dictating how to do so." *Deregulation of Radio*, 84 FCC 2d 968, 998 (1981).

[16] The Commission could have replaced the present logging duty with a rule requiring broadcasters to log all issue-responsive programming (as initially proposed in response to the court's remand of the radio deregulation decision, *UCC* v. *FCC*, *supra*). However, the quarterly issues-programs list is likely to provide much the same information because a licensee must describe issue-responsive programming as well as its time, date and duration. Since these lists will serve as "[t]he most significant source of issue-responsive information under the new regulatory scheme," *Report and Order* at para. 76, and since there is no limit to the number of issues that can be specified, it will

Having discussed the particulars of this decision, it is important that I set forth my understanding of a television broadcaster's public interest responsibilities under this revised scheme. Television licensees, as public trustees, must remain accountable for their exclusive use of valuable spectrum. This decision maintains that public accountability. Indeed, most broadcasters' public interest responsibilities remain unchanged by our actions here: every broadcaster must continue to air programming responsive to local needs,[17] and to assure that issues of particular relevance to all significant segments of the community are addressed.[18] Now, however, when a broadcaster's overall programming performance is challenged at renewal time, its rendition of these duties will be measured in the first instance by reference to quarterly issues-programs lists, rather than by its compliance with the ascertainment primer. Furthermore, the 1960 *En Banc Programming Statement's*[19] requirement that each broadcaster provide well-rounded, "something-for-everyone" programming has been modified. Licensees may now specialize, but their discretion to do so is elastic and will expand or contract depending on the number of television outlets in a market. In markets with relatively few stations (and, thus, where satisfaction of all programming needs through specialization will be economically impossible), a broadcaster's programming responsibilities remain exactly what they were before this decision. And, under the reasoning of the *Report and Order*,[20] most television stations will fall into this category because few local television markets presently approximate the narrowcasting environment indispensible to specialization .[21] Seen in this light, it is evident that the substantive changes made possible by this decision are relatively limited.

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behoove broadcasters to assemble the most comprehensive and informative lists possible. Consequently, these lists are likely to provide an index of public interest performance that is as informative as the issue-oriented logs. *See also* Petition for Reconsideration by National Radio Broadcasters Association in BC Docket No. 79-219, filed June 4, 1984 (complaining that new quarterly lists are too burdensome).

[17] *Report and Order*, para. 37. While we are deemphasizing the significance of quantitative performance, the amount of issue-oriented programming aired by a licensee will continue to be relevant in some contexts, contrary to the contention of the *Report and Order* in paragraph 37 ("arguments based solely on the failure to present amounts of nonentertainment programming will not be appropriate"). *See UCC* v. *FCC*, *supra*, 707 F. 2d at 1433-34; (Committee for Community Access v. *FCC*, No. 82-2314, Slip op. at 6-7 (June 15, 1984).

[18] *Report and Order*, para. 38.

[19] 44 FCC 2303 (1960).

[20] Footnotes 34 and 61.

[21] Even where specialization is feasible and permissible, no licensee may flatly ignore issues of concern to a significant segment of the community. Rather, a licensee may do so only after developing a reasonable basis for relying on another station in the market to address the needs in question. Thus, unless a broadcaster wants to endanger its renewal expectancy, it will exercise great care to assure that such needs are met.

As noted initially, I do take strong exception to this *Report and Order* in one respect: its failure to adopt a children's educational programming requirement and guideline.[22] This issue is the Achilles' heel of this Commission's efforts to deregulate the video marketplace and is a subject on which I have spoken elsewhere.[23] In brief, evidence before the FCC indicates that licensees are not fulfilling the special children's programming obligations previously imposed on them by the Commission; that commercial incentives discourage licensees from airing such programming; and, thus, that regulatory intervention is required to protect the public interest in this regard.[24] This proceeding, being framed broadly to review and revise the programming obligations of television licensees,[25] gave the Commission both the opportunity and the duty to correct the injury to children's interests caused by the Commission's refusal to promulgate a children's educational programming guideline.[26] The Commission seriously undermines the credibility and viability of its deregulatory efforts when it fails, as here, responsibly to address problems not accommodated by the marketplace. I dissent from the majority's continued irresponsibility in this regard.

I cannot help noting that the thorough evaluation of adult-oriented nonentertainment programming in this proceeding stands in marked contrast to the shallow effort made in the children's television docket. This difference explains why I can support most of this decision and why I

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[22] I also object to the apparent repeal of aggregate commercial time limitations insofar as children's programming is concerned. Not only does this represent an unexplained (and, thus, unlawful) departure from the FCC's prior conviction that special policies are required to protect vulnerable young viewers from overcommercialization, *Children's Television Policy Statement*, 50 FCC 2d at 1, 12-14 (1974), but it does so without any record support. Because the Commission by this action does not alter other policies governing commercial practices in the children's programming areas (*e.g.* the prohibition against host-selling, the requirement that program and commercial matter be separated, etc.), I can concur in its action in that regard, *see Report and Order* n. 99.

[23] *Children's Television Programming and Advertising Practices*, 49 Fed. Reg. 1704 (January 13, 1984), 55 RR 2d 199, 243 (1984) (Dissenting Statement of Commissioner Henry M. Rivera).

[24] *Id.* Despite the fact that specific evidence was proffered in this proceeding indicating that there is a continuing need for regulation addressing the children's programming issue — including a study by the House Subcommittee on Telecommunications, Consumer Protection and Finance and reports by the National Commission on Excellence in Education and the National Science Foundation — the Commission erroneously fails to discuss this evidence and persists in the mistaken course of action adopted in Docket 19142. *See* Comments of Action for Children's Television in Docket 83-670, filed November 17, 1983, at 5, 24.

[25] 94 FCC 2d at 700-01 (inviting commenters to propose all reasonable options for consideration).

[26] In fact, a specific proposal was lodged in the comments urging such action. *See* Comments of Action for Children's Television in Docket 83-670, filed Nov. 17, 1983.

adamantly opposed the action taken by the children's television order. In this decision, the Commission has relaxed its regulations only because empirical evidence corroborates economic theory and confirms that adult-oriented informational and other non-entertainment programming is currently available in substantial amounts and is likely to continue undiminished under reduced regulation. By comparison, in the children's television decision, the Commission conducted no study or survey to discover how much and what kind of programming is presently broadcast on commercial television to meet children's special needs.[27] Then, in the face of substantial record evidence suggesting market failure and its own recognition that economic incentives to air such programming are weak, the majority arbitrarily concluded that programming responsive to children's needs was adequate and retained only token agency oversight.[28] Importantly, this decision retains a vehicle for overseeing licensees' compliance with their obligation to air programming responsive to the needs of the adult audience (the issues-programs lists), unlike Docket 19142, which eschewed any form of reporting to enable the Commission to enforce licensees' purported "special obligation" to children.[29] Finally, unlike its approach to children's television, the Commission in appraising the need for continuing these rules has wisely focussed on the actual performance of commercial television broadcasters — who form the backbone of our television system and will continue to fulfill this role for the foreseeable future — instead of glossing over the facts and relying on the presumed performance of cable operators and others just now entering the video marketplace.[30]

In all other respects, I do not oppose the specific actions taken here. As I said at the outset, the success or failure of this new scheme from a public interest perspective will depend, as under the prior scheme, upon its good faith implementation. More specifically, its success or failure will depend, as before, upon the standards used to evaluate an incumbent's performance at renewal time in the face of a competing application or a petition to deny. This Commission's pursuit of a comparative renewal policy that is both coherent and lawful merits a footnote, if not a chapter,

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[27] *See Children's Television Programming and Advertising Practices, supra,* 55 RR 2d at 247.

[28] *Id.* at 206-07, 215. "[A] fig leaf," I called the vestigial oversight role retained by my colleagues, "to clothe the nakedness of the new policy." 55 RR 2d at 245.

[29] I urged the Commission to devise a special reporting requirement to monitor licensees' performance and to provide a continuing picture of what programming is available on commercial television to meet the unique needs of child viewers. *See id,* 55 RR 2d at 250.

[30] The acknowledgement here that the structure of local television markets is not now conducive to programming specialization exposes the makeweight nature of the argument in Docket 19142 that a children's programming requirement would impede station specialization. *See* 55 RR 2d at 254.

in the annals of American administrative law.[31] Our comparative renewal policy was not at issue in this proceeding.[32] This decision, however, by abandoning the benchmarks provided by some of these now eliminated rules and failing concurrently to provide clear guidance about what must be done to earn a legitimate renewal expectancy has done nothing to render the renewal process more objective or less susceptible to judicial criticism. Therefore, the Commission was most unwise in failing to resolve the comparative renewal inquiry concurrent with this proceeding.[33]

In summary, I can generally concur in this decision because the scheme it adopts is no worse than the one it replaces in assuring licensee accountability and, in some respects, may be better.[34] The Commission's failure to adopt, together with this order, a clear comparative renewal policy may lead broadcasters to rue the day this action was taken. I cannot say, however, that the general public[35] will suffer as a result of this decision.

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[31] *See generally Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983); *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983); *Central Florida Enterprises, Inc.* v. *FCC*, 598 F.2d 37 (D.C. Cir. 1978); *Citizens Communications Center* v. *FCC*, 447 F.2d 1201 (D.C. Cir. 1971). *See also Committee for Community Access* v. *FCC, supra.*

[32] That question is being considered elsewhere. *See Comparative Renewal Notice of Inquiry*, BC Docket No. 81-742, 88 FCC 2d 120 (1981); *Further Notice of Inquiry*, 47 Fed. Reg. 46117 (October 1982).

[33] Prompt resolution of the pending inquiry on comparative renewal standards is essential and had been promised by the staff; in view of the meager results produced by the FCC's prior efforts, however, I am not confident that this issue can be properly resolved absent legislative intervention.

[34] An apparent mystique has attached to the regulations under review here — that they are essential to the public accountability of commercial licensees. I disagree. What is essential is responsible oversight by the FCC of broadcaster performance. If this exists, reams of routinely filed paperwork are unnecessary. If it does not exist, no amount of administrative regulation will make a whit of difference.

[35] Except, as previously stated, the country's youth.

Common Carrier, International

Notice of Inquiry adopted requesting comments on policy alternatives for the distribution of circuits among North Atlantic facilities in the 1985-1991 period.
—*Common Carrier Facilities*
CC Docket No. 79-184

FCC 84-351

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Inquiry into the Policies to be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Telecommunications Needs During the 1985-1995 Period.	CC Docket No. 79-184

THIRD NOTICE OF INQUIRY

Adopted: July 26, 1984; Released: August 3, 1984

BY THE COMMISSION:

I. Introduction

1. The purpose of this Third Notice of Inquiry[1] is to develop guidelines

[1] We opened CC Docket No. 79-184 on August 1, 1979 with the release of a Notice of Inquiry to develop policies and guidelines governing our authorization of submarine cable and satellite facilities for use on North Atlantic routes during the 1985-1995 period. *See* Policies for Overseas Common Carrier Facilities, 73 FCC 2d 192 (1979). We subsequently released a Second Notice of Inquiry, Policies for Overseas Common Carrier Facilities, 76 FCC 2d 522 (1980), a Notice of Proposed Rulemaking, Policies for Overseas Common Carriers, 82 FCC 2d 407 (1980) and a Report and Order, Policies for Overseas Common Carriers, 84 FCC 2d 760 (1981).

In the initial Notice of Inquiry we defined the planning period and outlined our goals. In the Second Notice of Inquiry we requested detailed economic, technical and operational data from the carriers.

In the Notice of Proposed Rulemaking we solicited public comment on a series of carrier generated plans for meeting forecasted traffic demands during the planning period. We also solicited comments on a staff generated benchmark plan.

In our January 16, 1981 Report and Order, we set forth guidelines for North Atlantic facilities required during the 1985-1992 portion of the planning period. These guidelines

for the distribution of circuits among available North Atlantic facilities during the 1986-1991 portion of the planning period. The existing circuit distribution guidelines are embodied in the comprehensive plan for the construction and use of North Atlantic facilities developed in Docket No. 18875. These guidelines will expire at year-end 1985.[2] Since the comprehensive plan extends only until year-end 1985, a new circuit distribution policy must be developed in time to permit its orderly implementation at the beginning of 1986. In order to allow time for orderly implementation of the post-1985 policy, we shall follow a schedule which permits adoption of a new policy by mid-1985.

II. Background

2. We have addressed the question of the distribution of circuits among available facilities since the advent of communications satellites in 1965. Since that time satellites have provided an alternative to submarine cables for high quality transmission of international telecommunications services. Our involvement in circuit distribution decisions arose primarily because of our 1966 Authorized User Policy.[3] The 1966 Authorized User policy limits Comsat's role primarily to that of a "carrier's carrier" providing satellite circuits only to the United States international service carriers (USISCs) for their use in furnishing services to users. Comsat is permitted to provide circuits directly to users, absent a waiver, only in "unique and exceptional circumstances." As a result, Comsat was not in a position to develop its own traffic and has relied (as it continues to do today) on AT&T and the international record carriers (IRCs) for almost all of its traffic. To promote the objectives of the Communications Satellite Act of 1962 we acted to ensure that AT&T and the IRCs, who served end users directly and had a financial interest in submarine cables, made adequate use of the global satellite system.

3. We initially considered the circuit distribution question in the first application for a submarine cable filed after the availability of communications satellites. In *ITT Cable and Radio Inc. - Puerto Rico, et al.*, 5 FCC

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included a finding that either of the two designs for the INTELSAT VI series of satellites INTELSAT was then considering would be acceptable and that a digital, optical fiber TAT-8 cable available for service as early as 1988 would be in the public interest. We deferred consideration of the issues pertaining to distribution of circuits among available facilities, restoration of service following failure of a major facility and the specific configuration for the facilities addressed by the guidelines.

[2] *See* Future licensing of Overseas Communications Facilities, 73 FCC 2d 326 (1979) and Overseas Communications, 71 FCC 2d 71 (1979).

[3] Authorized Entities and Authorized Users, 4 FCC 2d 421 (1966), *recon. granted in part*, 6 FCC 2d 593 (1967). In 1982, we modified the Authorized User policy to permit Comsat to provide space segment capacity directly to users. Authorized User Policy, 90 FCC 2d 1394 (1982). However, that decision was vacated and remanded by the court, ITT World Communications, Inc. v. FCC, No. 79-1046 (D.C. Cir. January 13, 1984).

2d 823 (1966) (policy statement) and *AT&T, et al.*, 7 FCC 2d 959 (1967) (authorization) we authorized the construction of one earth station and an additional submarine cable for the provision of services between the United States mainland and the Puerto Rico/Virgin Islands area. We noted, however, that because Comsat would not generally have access to customers under the Authorized User Policy, AT&T and the IRCs would be in a position to determine the distribution of circuits between the cable and satellite facilities. Believing that Comsat at this early stage of its existence should not have to rely entirely on the circuit distribution decisions of other carriers, and in order to eliminate future disputes and to assure Comsat of reasonable use of satellite facilities, we determined that circuits should be distributed between the cable and satellite facilities being authorized on a 50-50 basis.

4. We first addressed the question of circuit distribution among available North Atlantic facilities in 1968 during our consideration of the application for the TAT-5 cable. We concluded that circuits should be distributed between the TAT-5 cable and the Atlantic Ocean Region INTELSAT satellites in a proportion which would result in that cable and those satellites becoming fully utilized at the same time.[4] It was subsequently determined that this proportional fill objective would require placing five circuits on the Atlantic Ocean Region satellites for each circuit placed on the TAT-5 cable.[5] We later modified our proportional fill requirement to specify that AT&T should distribute its circuits on a 50-50 basis between the TAT-5 cable and the Atlantic Ocean Region satellites. The international record carriers were granted greater loading flexibility and were permitted to activate 20 percent of their remaining TAT-5 circuits every six months.[6]

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[4] *See* AT&T, 11 FCC 2d 957 (1968) and AT&T, et al., 13 FCC 2d 235 (1968).

[5] *See* Comsat, et al., 29 FCC 2d 252 (1971).

[6] *See* Communications Satellite Corp., et al., 32 FCC 2d 103 (1971). In deciding to modify the proportional fill requirement, we noted that the information available at the time of our original decision indicated that both the TAT-5 cable and the INTELSAT IV satellites would initially have considerable spare capacity. Noting that there were then only 344 circuits carried by all INTELSAT satellites, we wished to assure a reasonable amount of traffic was placed on satellites to support the then fledgling system. We wished to avoid the situation where all TAT-5 circuits were utilized before any additional United States-Europe circuits were placed on satellites. However, considerable change had occurred. Between year-end 1967 and the end of September 1971, the INTELSAT system had become truly global in scope and the number of circuits carried by INTELSAT had increased nearly eight-fold from 344 to 2636. In addition, AT&T was now projecting it would require more than 800 circuits in the following two years for United States-Europe services, nearly four times the number of TAT-5 circuits AT&T had remaining unused. We noted that a new view had evolved concerning utilization of facilities on routes with large volumes of traffic which postulated that there should not be excessive reliance on any single facility to handle traffic growth and assure service continuity. We also noted the strong preference of the carriers' European correspondents to use cable and satellite

5. By 1970, it had become apparent that the pace of technological progress and the increased demand for international services had rendered review of individual applications for specific international facilities inadequate as a means of discharging our statutory responsibilities. Consequently, in June 1970, we initiated our first proceeding for the long-range, comprehensive review of facilities requirements and options with the release of a Notice of Inquiry in Docket No. 18875.[7] We there considered North Atlantic facilities requirements and options for the 1970-1979 period. In June 1971, we released a Statement of Policy and Guidelines setting forth the policies we would follow in authorizing North Atlantic facilities for the remainder of the 1970's.[8] In February 1975, we reactivated Docket 18875 for the purpose of addressing North Atlantic facilities requirements and options for the 1979-1985 period.[9] These comprehensive proceedings included discussions with our foreign counterparts in Europe and Canada.

6. Circuit distribution considerations were included as a part of Docket 18875. In developing circuit distribution guidelines in the second phase of Docket 18875, our goal was to arrive at a comprehensive facilities construction and use plan which would result in the lowest cost combination of facilities capable of meeting forecasted service demands while maintaining acceptable service standards to which all concerned Canadian, European and United States entities could agree.[10]

7. In both the facility planning guidelines we adopted in 1977[11] and the revised guidelines we adopted upon reconsideration in 1978,[12] we employed the balanced routing circuit distribution methodology proposed by AT&T.[13] In selecting the balanced loading methodology we noted that this plan would provide a number of benefits such as reducing to a minimum the number of circuits interrupted upon failure of a major facility,

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facilities equally, at least in the near term, with the ultimate objection of diversifying traffic on major routes over as many large capacity facilities as are available.

[7] Overseas Communications, FCC 70-620, 35 Fed. Reg. 10166 (released June 16, 1970).

[8] Overseas Communications, 30 FCC 2d 571 (1971).

[9] Overseas Communications, 53 FCC 2d 121 (1975).

[10] Overseas Communications, 62 FCC 2d 451, 458 (1976).

[11] Overseas Communication, 67 FCC 2d 358 (1977).

[12] Public Notice released October 25, 1978, FCC 78-758, Memorandum Opinion and Order, Overseas Communications, 71 FCC 2d 1090 (1978).

[13] The balanced routing (or balanced loading) methodology distributes circuits among facilities with unused capacity in a manner which, to the extent possible, results in all transmission systems between the United States and a given country carrying equal numbers of circuits. When one cable or satellite transmission system reaches the limits of its capacity, circuits are equally distributed among the remaining facilities which have unused capacity. When a new satellite or cable facility is introduced into service, all additional circuits are placed on that facility until it is carrying as many circuits as the other balanced systems.

providing a predictable method of circuit distribution in instances where actual demand varies from forecasted demand and generally providing for reasonable use of available cable and satellite facilites.[14] The plan negotiated by the carriers and their European correspondents, and accepted by us, was generally consistent with the balanced loading methodology but did depart from the guidelines for message telephone circuits for several countries and for all countries in the case of circuits used for record services. However, we noted that in an endeavor as complex as facilities planning, it was not clear that any single loading methodology could be universally applied. We recognized that there may be instances in which a different loading methodology might produce better results.

8. As to the deviations for circuits used for voice services, we found that the negotiated plan made reasonable use of existing and planned facilities.[15] As to circuits used for record services, we determined that these facilities should not be subjected to any particular circuit distribution method. The IRCs use only small percentage of available circuits. Further, leased circuit customers, most of whom lease facilities from the IRCs, often specify whether they wish a cable or satellite circuit to meet their particular requirements. We therefore concluded that the international record carriers should not be restrained from satisfying these specific customer requests by the imposition of a specific circuit distribution formula.[16] While we recognized that this course might lead to minor deviations from the agreed-to plan, we found that because of the relative small volume of leased circuits compared to message telephone circuits, this deviation would not have a major effect on the overall use of North Atlantic facilities.

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[14] *See* Overseas Communications, 71 FCC 2d 71 (1979) and Overseas Communications, 73 FCC 2d 326 (1979).

[15] In the event actual demand was less than forecast for a country to which balanced loading distribution was not used, AT&T proposed to activate circuits on the smallest growing path until it reached either the number of circuits called for by the negotiated plan or the level of use of the next larger path. Thereafter circuits would be placed on the next larger path. If demand was larger than forecast, AT&T proposed to simply move ahead to the circuit distribution for the next year set forth in the plan. *See* Overseas Communications, 73 FCC 2d at p. 331.

[16] We noted that switched record services such as telex and public message telegraph service could benefit from some of the advantages of balanced loading. However, we also exempted circuits used for these services from a specific circuit distribution methodology in order to permit the international record carriers maximum flexibility to reconfigure their circuits to satisfy leased circuit customers' requests for specific types of circuits.

9. More recently, we addressed distribution of circuits among available facilities in our 1982 Report and Order in CC Docket No. 82-170[17] where we modified our long-standing Authorized User policy. We again noted in the Report and Order that restricting Comsat to be a carrier's carrier without direct links to the using public was a primary factor leading the Commission to involve itself in the distribution of circuits. With the abolition of the Authorized User policy, we believed the stage would be set for Comsat's independence to develop its own traffic base. We stated that, as a matter of policy, we would not guarantee either cables or satellite any particular share of the market.

10. We stated our long-term goal to be the creation of ". . . .a viable international market in which users and carriers make facilities use decisions with as little regulatory interference as possible. A freely operating, competitive market is the best means of determining the relative efficiencies of the two mediums and of assuring that the comparative advantages of each will be appropriately passed on to the end user."[18] However, we recognized that the Authorized User policy had prevented Comsat from developing its own traffic base virtually from the beginning of international satellite service and that the effects of that policy would not disappear immediately. Consequently, we indicated that in the near term we would not remove ourselves totally from the facilities planning or use arena. With respect to the distribution of circuits, we proposed in the future to permit the carriers discretion in making circuit distribution decisions, relying on the developing market to provide them with guidance. However, we indicated that we would continue to monitor the carriers' use of facilites to assure that reasonable use is made of both cable and satellite facilities.

11. Our decision abolishing the Authorized User policy was initially stayed and then vacated and remanded to the Commission by the court.[19] The court found we had abused our discretion by deciding to abolish the Authorized User policy before we considered our Direct Access and Earth Station Ownership inquiries.[20]

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[17] Authorized User Policy, 90 FCC 2d 1394 (1982), *vacated* ITT World Communications Inc. v. FCC, No. 79-1046 (D.C. Cir. January 13, 1984.)

[18] Authorized User Policy, 90 FCC 2d at 1425-1426.

[19] ITT World Communications Inc. v. FCC, No. 79-1046, (D.C. Cir. Jan. 13, 1984).

[20] Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, 90 FCC 2d 1446 (1982) (Notice of Inquiry in CC Docket No. 82-548). Modification of Policy and Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System, 90 FCC 2d 1458 (1982), (Notice of Inquiry in CC Docket No. 82-540).

On March 30, 1984, we adopted a Report and Order in our Direct Access inquiry wherein we concluded that the proponents of direct access had failed to make a case which warranted proceeding with their proposals for direct access and we terminated that

12. Thus, the development of facility usage plans by this Commission and our foreign partners over the last two decades has balanced our desire to permit carriers greater flexibility in routing decisions with the realization that Comsat is dependent upon AT&T and the IRCs, entities with a clear economic preference for cable usage, for almost all of its traffic.

III. Discussion

13. Our goal is to establish an efficient communications network which balances the need for high quality service, diverse routes and sufficient capacity with the desire for reasonable rates for users. To this end, we have conducted comprehensive facility planning proceedings and have participated with our foreign counterparts in the consultative process to develop demand forecasts, to analyze facility costs and to discuss cable and satellite facility options for the current planning period. An integral part of these discussions has been the issue of loading. We believe a loading policy should be developed that encourages the efficient use of existing facilities and the development and deployment of more efficient facilities in a timely fashion. Thus, we seek a plan that maximizes reliability, service quality and efficiency and minimizes costs to users. We also seek a plan that satisfies demand by the lowest cost combination of facilities capable of maintaining acceptable service standards. Finally, we believe that users would benefit from a plan which will encourage the construction of a future facility because it is the most efficient facility available rather than because it satisfies an artificial demand for a particular type of facility.

14. Because the circuit distribution guidelines currently in effect expire at the end of 1985, we must develop a policy pertaining to circuit distribution for the post-1985 period in sufficient time to allow its orderly implementation at the beginning of 1986. Below we outline some loading options, describe each option in greater detail, make some preliminary

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proceeding. Report and Order, FCC 84-129, ____ FCC 2d ____ (1984). On the same day, we issued a Notice of Proposed Rulemaking in the Earth Station Ownership inquiry in which we tentatively concluded that allowing United States carriers to own and operate their own earth stations accessing INTELSAT space segment would serve the public interest. Notice of Proposed Rulemaking, FCC 84-122. On April 11, 1984, we adopted a Further Notice of Proposed Rulemaking in our Authorized User proceeding in which we requested interested persons to comment on the relationship of our denial of direct carrier access to INTELSAT space segment and our proposal to adopt a policy allowing independent ownership of earth stations to our policy allowing Comsat to make basic satellite transmission capacity available to all users at U.S. earth stations and allowing it to provide international end-to-end services through a separate corporate subsidiary. Further Notice of Proposed Rulemaking, FCC 84-151.

remarks on these methodologies and indicate the topics on which we seek additional information and comments from interested parties.

15. *Options*: A number of policy options exist for 1985-1991 period. One option is to continue to use the balanced loading methodology as the basis for circuit distribution plans as developed in Docket No. 18875. Under balanced loading all available satellite and cable facilities are used equally to provide service to a particular overseas country. When one facility, such as a smaller cable, is saturated, it falls out of the loading pattern and additional traffic growth is routed over the remaining facilities. At the present time the monthly circuit status reports filed by the carriers indicate that the existing policy has produced a satellite-cable facility usage ratio in the North Atlantic region of approximately 50-50 (specifically 48% cable, 52% satellite). However, the retirement of old cables, the saturation of most other cables except TAT-7 and the not yet operational TAT-8, and the continued availability of capacity in all three INTELSAT satellites in the Atlantic Ocean Region would result, assuming the continuation of the balanced loading methodology, in an increased reliance on satellites after 1985. Thus, in the late 1980's and early 1990's, approximately forty percent of traffic growth would be placed on the two available cable paths (TAT-7 and TAT-8) and approximately sixty percent of the traffic growth would be placed on the three available satellite paths (Primary, Major Path I and Major Path II). Upon the saturation of TAT-7, twenty-five percent of the traffic growth would be placed on the one remaining cable path (TAT-8) and seventy-five percent of the traffic growth would be placed over the three available satellite paths. Of course, loading is done on a country-by-country basis and the percentages would change depending on the number of satellite or cables a country decided to access.

16. Another option is to develop new distribution guidelines. Some alternative methodologies have been suggested in earlier stages of this docket and in Docket No. 18875. Distribution guidelines could be developed on a carrier-by-carrier basis. For example, guidelines could apply only to AT&T since this carrier uses the majority of international circuits. Distribution guidelines could also be developed on a service-by-service basis. For example, guidelines could be developed for switched voice service provided by any carrier, whether it be AT&T or a new entrant. Interested parties could also propose the use of percentages, absolute numbers, phase-in periods or any combination of these factors on a country-by-country or regional basis.[21]

[21] AT&T suggested in CC Docket No. 79-184 that it be permitted to vary its distribution of circuits between the limits of placing 40 to 60 per cent of its United States-Europe circuits on either cable or satellite facilities. Recent discussions in the North Atlantic Consultative Process indicate that it is the view of the European participants that there

17. A third policy option is to simply remove ourselves from circuit distribution decisions. As noted earlier herein, we no longer impose any specific circuit distribution scheme on circuits used for record services but merely require that carriers submit their expected distribution of such circuits for facility planning and market monitoring purposes. Under this option we would extend this approach to circuits used for message telephone service as well.

18. *Continued Use of the Balanced Loading Methodology*: As discussed earlier herein, the use of balanced loading for circuit distribution was considered in Docket No. 18875 and was used in the guidelines we adopted for the 1979-1985 period. We there found that balanced loading offered a number of benefits including reducing to a minimum the number of circuits lost upon failure of a major facility, providing a predictable method of circuit distribution in instances where actual circuit demand varies from forecasted demand, and generally providing for reasonable use of cable and satellite facilities. Continuing with this policy might produce the same benefits. On the other hand, in view of the efficiencies that one technology may provide as compared to another, it is not clear that a balanced loading policy would produce the most efficient loading plan possible for either carriers or users.

19. *Alternative Methodologies*: New guidelines could be developed to govern the loading of satellite and cable facilities in the North Atlantic region. The number of possibilities is infinite. On the one hand, Comsat has an interest in maximizing the use of the facilities in which it has invested. On the other hand, it is clear from discussions at the January 31-February 2, 1984 North Atlantic Consultative Working Group meeting and the March 26-27, 1984 Senior Level meeting of the North Atlantic Consultative Process that a number of entities would prefer the adoption of a methodology which would permit the routing of more traffic over cable facilities than would be obtained under the balanced loading approach. This would allow the owners of TAT-7 and TAT-8 to route a greater percentage of future traffic growth over these cables in which they have sunk a sizeable investment. Thus, they would realize an earlier return on these facility investments. A possible option would be to continue to exempt the IRC's from any specific circuit distribution guidelines, to expand that exemption to include new entrants in both the record and voice markets, and to develop a more flexible policy for AT&T.

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is a firm requirement for flexibility in circuit distribution principles which will evolve from bilateral discussions and agreements with their United States carrier correspondents. During these discussions the European participants suggested a loading plan which phased-in a greater percentage use of cable facilities during the 1986-1995 period. On a percentage basis, it appears that the mathematics of the European participants' proposal would eventually result in a cable-satellite mix of nearly sixty percent cable and slightly over forty percent satellite.

20. While Comsat has a clear preference for satellite usage and the USISCs have a clear preference for cable usage, most of their foreign correspondents have substantial investment interests in both satellite and cable facilities. We intend to exchange viewpoints with the foreign administrations who jointly own and operate international facilities with U.S. carriers. To this end, the Working Group of the North Atlantic consultative process will meet early next year to discuss loading options.

21. *Removal of the Commission from Circuit Distribution Decisions*: Under this option, we would not issue any guidelines or prescribe any loading methodology for circuitry used for either voice or record services. All carriers would be free to distribute circuits among available facilities as they and their foreign correspondents saw fit. These loading plans would result from bilateral or multilateral discussions between U.S. carriers and their foreign correspondents and would be submitted to the Commission. In putting forth this "no guideline" option for public comment, we are very much aware that we are considering this matter at a time of transition in the international telecommunications industry. Yet, our primary concern must be the welfare of customers, not carriers. Our view is that in the long term consumer interests can best be served by a competitive market for international communications. However, because of the stay and subsequent remand of our decision to alter the Authorized User policy, Comsat's ability to develop a traffic base through provision of service directly to users remains restricted. As of the end of 1983, approximately 88 percent of all the cable and satellite circuits in service between the United States and European countries were used by AT&T for message telephone service.

22. Nevertheless, there are a number of developments which have at least the potential to enhance Comsat's market position, make competition among international facilities more viable, and to modify the USISCs preference for cable facilities in the not too distant future. Such developments may permit the adoption of a "no guideline" policy or the fashioning of guidelines which might transition into a "no guidelines" policy. First, we would note that the court's decision vacating and remanding our abolition of the Authorized User policy does not, as a matter of law or policy, preclude us from reaching the same result after further review of additional considerations. We cannot, of course, today reach any decision on that question.

23. Second, we note our tentative conclusions in the Earth Station Ownership proceeding that the independent ownership of earth stations by carriers would serve the public interest. If this policy were ultimately adopted, it would augment the market base for the use of INTELSAT satellites. Ownership of earth stations might alter somewhat the clear preference of carriers which now own cable facilities to use those cable

circuits rather than to lease satellite circuits. Further, cable owning carriers are discussing with Comsat the dissolution of the Earth Station Ownership Consortium and the possible transfer of earth station facilities/assets to carriers with cable ownership interests.

24. Third, INTELSAT has recently developed new service offerings, such as INTELSAT Business Services (IBS), which should generate additional satellite traffic.[22] We note that we have already authorized seven special purpose earth stations for the provision of IBS. International Relay, Inc. has been authorized to construct four such earth stations.[23] Comsat,[24] ITT World Communications Inc.,[25] and TRT Telecommunications Corporation[26] each have been authorized to construct one such earth station. We also note that there are a number of additional applications pending for authority to construct special purpose earth stations for the provision of IBS and international television services filed by an existing carrier and a number of new entrants. Other new service offerings recently developed by INTELSAT include an expanded range of leased transponders for television transmission and reception services on both a preemptible and non-preemptible basis. INTELSAT also has approved, in principle, the provision of a data distribution service (INTELNET) which will utilize leased transponders, or fractions of transponders, for the distribution of data to earth stations with antennas as small as 0.6 meters. Finally, we would note that U.S. carriers serve a large number of overseas points (over 50) only by means of INTELSAT satellites and that no U.S. carrier has advocated a wholesale departure from use of satellite facilities.

25. *Comments and Information*: We request that interested parties address all three policy options, propose other options if they so desire, indicate their policy preferences and submit, if appropriate, specific guidelines. We further request these parties to set forth the benefits and negative consequences that might result from adoption of each policy

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[22] INTELSAT Business Services are integrated digital services designed to accommodate a full range of user communications needs including voice, data, facsimile and teleconferencing applications. INTELSAT has planned the space segment for IBS for use with a comparatively large number of earth stations including earth stations employing medium or small sized antennas. Earth stations employing small and medium size antennas are expected to be located on user premises or close to user locations in or near urban areas.

[23] Memorandum Opinion, Order and Authorization, FCC 84-125 (released April 11, 1984) and Memorandum Opinion, Order and Authorization, FCC File Nos. I-T-C-84-109, CSG-84-025-P/L, I-T-C-84-110 and CSG-84-026-P/L (released July 9, 1984).

[24] Memorandum Opinion, Order and Authorization, FCC 84-126 (released April 11, 1984).

[25] Memorandum Opinion, Order and Authorization, FCC File Nos. I-T-C-84-111 and CSG-84-027-P/L (released July 6, 1984).

[26] Memorandum Opinion, Order and Authorization, FCC File Nos. I-T-C-84-076 and CSG-84-006-P/L (released July 6, 1984).

option. We also request parties to address the ability of marketplace forces to efficiently determine circuit distribution decisions and the effect of adopting a particular policy option on INTELSAT's planning process.[27] We further ask that the parties address the effect on the development of competition in international telecommunications of the adoption of each policy option. In addition, we ask that the parties suggest mechanisms which could be used to phase-out our involvement in circuit distribution decisions. These suggestions should address how guidelines might be fashioned to facilitate the phasing-out of our involvement and suggest the period of time for accomplishing this transition.

26. We also request that all carriers made party to this proceeding submit their most recent forecast of circuit demand for 1985-1995. We further request that the message telephone carriers submit plans distributing message telephone circuits in accordance with their proposal in the format utilized in the Second Notice of Inquiry phase of this docket.

27. If a carrier proposes a circuit distribution methodology which utilizes a percentage distribution between cable and satellite facilities the carrier should submit a plan showing the detailed distribution scheme of circuits from 1986 to 1991. If a carrier proposes a circuit distribution methodology which permits total flexibility within a percentage range, such as AT&T's sixty-forty proposal, then the carrier should submit a plan showing the distribution of circuits at each percentage limit of the range for each year from 1986 to 1991. Because the circuit distribution policy currently in use for message telephone circuits is primarily based on the balanced loading distribution methodology, we also request these carriers to submit a plan distributing circuits using the balanced loading methodology. Such a plan will allow comparison of their proposed circuit distribution with the current distribution of message telephone circuits. All plans submitted should be based on a carrier's most recent forecast of circuit demand.

28. Carriers should also analyze the circuit methodologies they submit in terms of: (a) their cost to users; (b) their effect on service quality; (c) the predicability of circuit distribution in the event actual circuit demand

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[27] INTELSAT bases its satellite facility and operational planning on a Global Traffic Data Base. The Global Traffic Data Bases consists of yearly projections of INTELSAT satellite circuit used submitted by INTELSAT Signatories. Comsat, as United States signatory, is dependent on the United States carriers for their projections of satellite circuits use. That projection is dependent on the distribution of circuits between cable and satellites as well as on forecasts of circuit demand. Because of the volume of traffic which originates and terminates in the United States, inaccuracies in the United States submission to the INTELSAT Traffic Data Base can have a significant effect. We request that the carriers and Comsat comment on the effect, if any, on the accurracy of the INTELSAT Global Traffic Data Base of our removing ourselves from decisions affecting the distribution of circuits.

varies from the level forecast; and (d) the cost to users and the effect on service quality in the event actual circuit demand varies from the level forecast. The results of the analyses of their preferred distribution methodology should be compared with that for the balanced loading circuit distribution they submit. Carriers should also submit information as to how circuitry in major facilities they utilize will be loaded in other facilities in case of outages.

29. We do not now contemplate altering our present policy of not subjecting circuits used for record traffic to a specific circuit distribution methodology. We will therefore not specifically request any carrier to submit a plan utilizing balanced loading circuit distribution for record circuits or an analysis of their expected circuit distribution with a balanced loading distribution. However, we do request that the carriers submit their expected circuit distribution for record circuits in the format used in the earlier phases of this docket. Such distributions are essential for our analysis and necessary to permit us to monitor the carriers' use of available facilities.

30. We also invite any other interested person to submit proposed circuit distributions and analyses for our consideration if they so desire. Any such submissions should follow the same format and other parameters we have requested the carriers to follow and cover the 1986-1991 period.

31. Finally, while we are requiring the carriers to submit distribution plans for the 1985-1991 period in order to avoid complicating analyses of the plans by the inclusion of facilities which we have not yet addressed, we wish to indicate that we do not intend to limit parties from considering a longer time period in their comments. Indeed, removing ourselves from circuit distribution decisions, should we ultimately adopt that option, would not likely be limited to such a short period of time. It is also possible that some parties may consider the period between 1985 and 1991 too short to complete an orderly transition. Therefore, parties may desire to address a longer time period in their comments. However, we do request that parties which choose to submit additional distribution plans which extend beyond 1991 identify any additional facilities assumed in the plans and set forth the design, capacity and costs assumed for those facilities.

32. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 214 and 403 of the Communications Act of 1934, 47 U.S.C. Section 154(i), 214 and 403 (1983) and Section 201(c) of the Communications Satellite Act of 1962, 47 U.S.C. § 801 (1983), that this Third Notice of Inquiry is initiated and:

a. The American Telephone and Telegraph Company, The Communications Satellite Corporation, FTC Communications, Inc., The Hawaiian Telephone Company, ITT World Communications Inc., RCA Global Communications, Inc., TRT Telecommunications Corporation, The Western Union Telegraph Company and Western Union International, Inc., are hereby made parties to this inquiry;

b. Each of the parties shall respond to the information requests applicable to it;

c. Any party may submit such additional information or views it believes relevant to the issues to be explored in this Inquiry; and

d. All other interested persons are invited to submit responses to the information requests contained in this Inquiry and to submit any comments and information they believe relevant to the issues to be explored.

33. IT IS FURTHER ORDERED that:

a. Traffic forecasts requested herein shall be submitted by August 31, 1984;

b. Circuit distribution plans and comments on policy option shall be submitted by September 14, 1984;

c. Analyses of the proposed circuit distribution plans shall be submitted on October 10, 1984; and

d. Final comments on all previous submissions shall be submitted on November 2, 1984.

34. IT IS FURTHER ORDERED that the Commission's staff is hereby delegated authority to modify the information requested by this Notice, to request any additional information necessary to provide a complete record for this inquiry and to hold public meetings as appropriate.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

CATV Jurisdiction Over, By Local Municipality
CATV Jurisdiction Over, By State Authority
Filing Time for
Participation, Non-party
Reconsideration, Petition for, denial of
Reconsideration, Petition for, Time for

Denied requests for reconsideration of prior declaratory ruling. One petition late-filed, another petition filed by party not participating below without adequate justification. Remaining petitioners failed to show procedural error in granting ruling, nor that Commission erred in finding competitive market for video services.
—*Community Cable TV, Inc,*

FCC 84-331

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
Community Cable TV, Inc.	CSR-2269
Petitions for Reconsideration	
Cablevision Of New Jersey And Cablevision Systems Development Company	CSR-2622
Petition for Special Relief	

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 1984; Released: July 25, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

Introduction

1. The Public Service Commission of Nevada (hereinafter "PSC"); the Cable Television Information Center (hereinafter "CTIC"); and the National League of Cities (hereinafter "NLC"), on December 15, 1983, filed petitions for reconsideration of the Commission's decision in *Community Cable TV, Inc.*, 54 RR 2d 1351 (1983). That same day, the City of Dallas, Texas (hereinafter "Dallas") filed a request for extension of time to file its petition for reconsideration, which it filed on December 23, 1983.

These petitions are opposed by Community Cable TV, Inc. (hereinafter "CCTV"), which also opposes Dallas' extension request; Group W Cable, Inc. (hereinafter "Group W"); the National Cable Television Association, Inc. (hereinafter "NCTA"); Adams-Russell Telecommunications Group (hereinafter "ART"); and Time Inc. (hereinafter "Time").[1] In addition, Warner Amex Cable Communications Inc. (hereinafter "Warner Amex"), operator of a cable television system serving Dallas, Texas, has opposed Dallas' petition for reconsideration. CTIC, NLC, and Dallas have replied. Subsequently, on April 25, 1984, Cablevision of New Jersey and Cablevision Systems Development Company (hereinafter "Cablevision"), a multiple cable television system operator in New Jersey, filed a petition for special relief seeking an expedited declaratory ruling concerning the extent of the Commission's preemption confirmed in *Community Cable TV, Inc., supra.* Cablevision's petition is opposed by the Board of Public Utilities, Office of Cable Television, State of New Jersey (hereinafter "the Board"), and Cablevision has replied. We are consolidating these cases for consideration.

2. The instant proceeding arose as a result of the decision in *In re Proposed General Order No. 40,* Docket No. 82-343 (Nev. Pub. Serv. Comm'n, Nov. 2, 1982). On July 15, 1982, PSC proposed to adopt General Order No. 40 in order to clarify and define the terms and provisions of Nevada's cable television system laws, Nev. Rev. Stat. §§711 *et seq.* General Order No. 40 contemplates rate regulation by PSC for all subscriber service, a term defined in Section 2.8 of General Order No. 40 as "all cable television service provided other than pay channel services." Section 2.7 defined pay channel service as "a channel which is individually charged to customers." A public hearing on the PSC proposal was held in Carson City, Nevada, on September 28, 1982, in which CCTV and other parties participated. As a result of this hearing, PSC found, contrary to the position urged by CCTV and other cable television companies (*see In re Proposed General Order No. 40,* slip op. at 4-5), that "[t]he scope of federal preemption over CATV service is necessarily limited to specialized programming for which a per-program or per-channel charge is made. . . " *Id.* at 8.

3. On February 3, 1983, CCTV sought from the Commission a declaratory ruling confirming that the Commission's preemption of cable television system rate regulation

> extends not only to pay or subscription cable services (*i.e.*, programming for which a per-channel or per-program charge is made) but also to specialized or auxiliary cable services — primarily satellite-delivered programming — of the kind commonly

[1] CCTV, Group W, and NCTA oppose NLC's filing, because NLC was not previously a party, and, opponents allege, has not shown good cause for this lack of participation.

provided in tiers of services offered to subscribers at a single package rate distinct from the rate charged for regular subscriber services.

Comments both in support of and in opposition to CCTV's request were filed by several parties. In *Community Cable TV, Inc., supra,* the Commission granted CCTV's request, stating that "it is . . . clear that our preemptive jurisdiction . . . extends to nonbasic services whether they are priced individually by channel or by program or as a group in one or more tiers of service." *Id.* at 1359.[2] The Commission further found that "[c]ontinued federal preemption is needed to preclude artificial and unnecessary skewing of the market that nonfederal regulation of entry and price could produce," *id.* at 1360 (footnote omitted), and that "it appears that the existing competitive marketplace is sufficiently capable of imposing controls on pricing policies for auxiliary video services." *Id.*

4. We must note at the outset certain procedural irregularities which have arisen in this stage of the proceeding. NLC was not initially a party to this proceeding. Section 1.106(b)(1) of the Commission's Rules, therefore, requires a showing of "good reason why it was not possible . . . to participate in the earlier stages of the proceeding." NLC's explanation that it did not anticipate the Commission's decision and that NLC was at the time "actively seeking to develop federal cable legislation to address, among other issues, rate regulation" does not constitute such good reason, particularly in view of NCTA's prior participation despite its involvement in similar endeavors. In addition, because NLC's pleadings contain virtually no new arguments, nor any factual material which would otherwise be unavailable to us, we find that no overriding public interest considerations warrant their acceptance. Accordingly, NLC's petition will be dismissed.[3] A similar problem is raised by Dallas' late-filed petition. In this case, though, it is settled that, absent Commission error resulting in a petitioner not having adequate time reasonably to comply with the statutory deadline, the 30-day period, established by Section 405 of the Communications Act of 1934, as amended, will not be extended. *Gardner v. FCC,* 530 F.2d 1086, 1091-1092 (D.C. Cir. 1976); *Mobile Telephone, Inc.,* 91 FCC 2d 907, 909 (1982); *The Ridgewood Group,* 79 FCC 2d 588 (1980). Dallas has not shown that an 8-day delay in formal service on it of the

[2] Basic subscriber service consists of "that service regularly provided to all subscribers." *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry,* 46 FCC 2d 175, 199 (1974) [hereinafter *"Clarification"*]. *See also Cable Television Report and Order,* 36 FCC 2d 143, 209 (1972). Nonbasic service, therefore, consists of those services, whether offered singly or in tiers, not provided to all subscribers, for which additional fees are charged. *See also* note 6, *infra.*

[3] We will also not give consideration to a letter submitted in support of NLC's petition, on January 23, 1984, by the Mayor of Greenville, North Carolina, who also did not participate below, and who believes that the Commission has preempted all local authority over cable television. We have not.

Commission's prior opinion prevented it from meeting the 30-day deadline. Accordingly, Dallas' petition must also be dismissed.

Summary of Pleadings

CSR-2269 Petitions for Reconsideration

5. Petitioners for reconsideration generally argue that the Commission's theory and analysis underlying its preemption of state and local nonbasic rate regulation is unfounded, and also that the Commission has exceeded its authority in preempting such rate regulation without a rulemaking such as, notes PSC, the outstanding proceeding in the *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in Docket No. 21002*, 71 FCC 2d 569 (1979). CTIC in particular argues that local authorities have long presumed that their regulation of the rates for nonbasic services (save for those offered on a per-channel or per-view basis) was permissible, and cite examples of existing or proposed franchises which allow for such regulation.[4] Nevertheless, petitioners assert, nonbasic subscriber services have flourished despite the general presumption that the rates for their receipt are regulable. Nor is the video services marketplace yet competitive, contends CTIC, who also argues that "[t]here may be substitutes, however, imperfect, for the movie-oriented pay services, but there are virtually no substitutes for Cable News Network, the Health Channel or Nickelodeon."

6. Petitioners claim that the plain meaning of the Commission's own precedent — preempting, in petitioners' view, local rate regulation only of services offered on a per-channel or per-program basis — has been ignored, or its language taken out of context. PSC argues that *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979), only upheld the Commission's authority to preempt regulation of per-channel and per-program rates, and further argues that *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970), upheld PSC's regulatory authority over cable television.

7. Opponents generally argue that the Commission had no need in this instance to promulgate or commence a rulemaking proceeding, for, as CCTV noted at the initiation of this proceeding, and as the Commission stated in its decision, at issue herein is no new policy but, rather, a clarification of existing policy. Accordingly, contend opponents, the Commission not only has the authority to preempt, but had properly done so in this field. Moreover, the marketplace for nonbasic video services is

[4] Among the examples cited are franchise agreements or proposals in Tucson, Arizona; Miami, Florida; Minneapolis, Minnesota; Omaha, Nebraska; New York, New York; and Fairfax County, Virginia.

increasingly competitive, opponents argue, citing alternatives to cable television such as off-air broadcasting, subscription television (STV), multi-point distribution service (MDS), low power television (LPTV), satellite master antenna television (SMATV), video cassettes and discs, and direct broadcast satellites (DBS), as well as other entertainment, news, and information services. The Commission's decision in *Community Cable TV, Inc., supra,* asserts CCTV, was not based on an erroneous presumption that state and local regulatory authorities recognized the scope of the Commission's preemption, but was based on the Commission's judicially-affirmed authority, its prior rulings, and the rulings' continued validity. That certain local authorities may believe or have acted in error, note ART and Group W, does not transform such error into legal policy. Erroneous beliefs are that: erroneous. Indeed, notes Group W, citing comments initially filed in this proceeding, local regulation can and, in some cases, has stiffled the development of various services. According to NCTA, such regulation has also impeded cable systems' ability to achieve profits, both through direct regulation of rates and through impeding operators' flexibility to package and market services, a concern also shared by Time and Warner Amex.

8. Group W contends that, by its own terms, *TV Pix, Inc. v. Taylor, supra,* does not bar Commission preemption, for at that time (1968), the Commission had not yet exercised its preemptive authority, a fact relied upon by the court, which acknowledged the Commission's authority to do so. Group W further argues that several petitioners — CTIC in particular — reiterate arguments raised earlier, and that therefore their petitions for reconsideration are defective. Warner Amex also argues that, contrary to Dallas' characterization, cable television is not a public utility — it is not a natural monopoly, nor does it provide a necessary service. Indeed, Warner Amex states, because the Dallas franchise explicitly permits local regulation of "basic rates and charges," it is consistent with the Commission's decision.

9. In reply, in addition to reiterating earlier arguments, CTIC contends that opponents have not rebutted the fact that most state and local authorities presumed that they could regulate the rates for nonbasic cable services, nor that this presumption has not inhibited the development of such services. CTIC further argues that while pay-per-channel or pay-per-view programming may experience marketplace competition, there is no substitute for or competition to the specialized, "narrowcast" program services — such as all-news, all-weather, and all-sports services — "that comprise the bulk of the tiered packages under consideration here."

CSR-2622 Petition for Declaratory Ruling

10. Cablevision, in support of its petition, states that it is prompted by an initial decision of a New Jersey Administrative Law Judge, *In re*

Cablevision of Bayonne (OAL Dkt. No. CTV 8658-83, April 2, 1984). Cablevision had obtained its municipal franchises between 1975 and 1980, and offered its subscribers basic service of 28 channels at a rate of $7.00 per month. Cablevision's basic service included both mandatory and discretionary signals. In September 1981, Cablevision sought approval, which was granted in 1982 by the Board, to offer basic service of 19 channels at a rate of $4.50 per month, and placed the remaining 9 channels on a second tier at an additional cost of $2.50 per month. Cablevision offers additional premium services to compose a total of 36 channels. In November 1982, Cablevision informed the Board of its intent to raise its second-tier monthly rate by $2.00. The Board maintained that Cablevision's second tier was part of basic service, regulable by the Board. Subsequently, the Board ordered Cablevision to cease scrambling a pay sports channel which Cablevision had begun to offer, and also ordered that Cablevision maintain its present rate structure for both the first and second tiers of service. Cablevision sought to transfer the controversy to the Office of Administrative Law, bringing to the Offices' attention, *inter alia*, the Commission's decision in *Community Cable TV, Inc., supra*, and a letter from the Chief of the Cable Television Branch to Paul Glist, Esq., confirming cable operators' discretion to carry discretionary services on nonbasic tiers. However, in *In re Cablevision of Bayonne, supra*, the Administrative Law Judge ruled that the Commission's preemption applied only to new services offered; existing services are regulable as first represented and offered. Cablevision contends that this interpretation of Commission policy is in error. Numerous Commission decisions, reviewed by Cablevision, demonstrate the Commission's preemption of nonbasic services and signal carriage regulation, Cablevision argues, and that inconsistent franchise provisions are null and void. *In re Cablevision of Bayonne, supra*, is contrary to Commission policy, asserts Cablevision, which makes no distinction between placing a discretionary service on a particular tier initially and removing the service later.

11. The Board opposed Cablevision's petition on June 8, 1984. The Board agrees that the Commission has preempted rate regulation of nonbasic service, but argues that basic service includes all services originally proposed for carriage and agreed to by a franchisee. In fact, notes the Board, such a proposal of services must be submitted with a franchise application, pursuant to N.J. Stat. Ann. §48:5A-28(b), and also a schedule of proposed rates, which shall not be altered during the franchise term, pursuant to N.J. Stat. Ann. §48:5A-28(g). The Board contends that Cablevision's filings before the Board are indicative of a recognition of the system's limitations under the franchise and local law. The Board asserts that its reliance upon Cablevision's representations to the franchising authorities must be weighed in analyzing the public interest, and that the

Board's regulation of established services will not impede the development of new services. Cablevision, argues the Board, possesses sufficient marketing flexibility under its franchise and the Board's policies. In addition, the Board maintains that municipalities should not be deprived of franchise fees by enabling systems to remove services from basic tiers and to place them on premium tiers.[5]

Discussion

12. It is evident that petitioners have fundamentally misconstrued the thrust of our prior decision. As the United States Supreme Court most recently recognized in *Capital Cities Cable, Inc. v. Crisp.*, 52 U.S.L.W. 4803 (1984), our policy in this field has been explicit and settled for two decades. *E.g., United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978). *cert. denied*, 441 U.S. 904 (1979). *Accord*, Rep. No. 98-67, 98th Cong., 1st Sess. 6 (1983). Our decision below broke no new ground,[6] and, consequently, no rulemaking was needed to respond to CCTV.[7] As the United States Court of Appeals for the Second Circuit has stated: "The policy to preempt has been shouted from the rooftops . . . and the FCC has explicitly indicated its intent that there be no price regulation whatever of the relevant area. . . ." *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d at 768 (citations omitted). Moreover, *TV Pix, Inc. v. Taylor, supra*, cited by PSC,

[5] In reply, on June 19, 1984, Cablevision argues that the Board misunderstands the expansive nature of the Commission's preemption, and that Cablevision's program complement is far more diverse today than when the system began operations. In addition, Cablevision contends that the Supreme Court's decision in *Capital Cities Cable, Inc. v. Crisp.*, 52 U.S.L.W. 4803 (1984), supports Cablevision's position.

[6] As we stated in *Community Cable TV, Inc.*, 54 RR 2d at 1360, nonbasic services are those "not regularly provided to all subscribers. . . ." That is, those services above and beyond the basic service tier, which every subscriber to a system receives. There is no magic number of channels which constitutes basic service, save for the minimal requirement of all mandatory signals. Given our preemption of local signal carriage regulation, the choice at any time of what will constitute basic service above and beyond signals whose carriage is mandated by our rules, remains within the discretion of the system operator. Of course, if an operator chooses to provide discretionary services as part of basic service, whether this be 12-, 20-, 36-, or 54-channel service, or more, the rate for the entire basic tier remains subject to local regulation.

[7] It is also settled that "the only valid grounds for rehearing are manifest error or omission so material that the corrections would result in substantial alteration of the original decision. Correspondingly, rehearing generally is not available for the purpose of rearguing matters on which there has been deliberation and decision. . . ." *Empire State Cable TV Co., Inc.* (Binghamton, New York), 10 FCC 2d 341, 342 (1967). *See also Waterbury Community Antenna, Inc.* (Waterbury, Connecticut), 85 FCC 2d 1049, 1052 (1981); *WWIZ, Inc.* (Lorain, Ohio), 37 FCC 685, 686 (1964). Accordingly, insofar as petitioners reiterate arguments raised below, their petitions will be denied.

recognized that local regulation of cable television was appropriate only in the absence of Congressional or Commission preemption. *Id.* at 463, 466.

13. The fact that a number of local franchising authorities may believe that their regulatory authority over nonbasic services had not been preempted, and even acted upon that belief, is not proof that the belief is correct. A belief in error is still in error.[8] Petitioners place great weight on the Commission's prior enumerations of examples of video services, local rate regulation of which had been preempted. Petitioners fail to come to grips with the fact that these enumerations were by way of example, and were clearly not exclusive. As early as the *First Report and Order in Docket No. 18397*, 20 FCC 2d 201, 216 (1969), we stated that "we do not presently contemplate any prohibition against higher monthly fees or per program charges for *other* minority interest programming, or special charges for *other* extra services . . ." (emphasis added). Again, five years later, we noted that our preemption encompassed not only developing specialized services, but also "*all other areas* of rate regulation in cable, i.e., advertising, pay services . . . *etc.*" *Clarification* at 200 (emphasis added).[9] The plain meaning of such language is neither narrow nor limiting, as urged by petitioners, but is rather open-ended and expansive. Nor is petitioners' analysis of precedent consistent with the Commission's clearly stated intent to preempt the field broadly so as not to "have a chilling effect on the anticipated development [of specialized services]." *Id.* Less than two years after issuing the *Clarification, supra*, the Commission reiterated that regular subscriber services consisted of "broadcast signals required to be carried by our rules as well as all required access services associated therewith and installation and reconnection charges, etc. It does not apply to auxiliary services such as pay cable, advertising, leased channels, etc." *Notice of Proposed Rulemaking in Docket No. 20681*, 57 FCC 2d 368, 370 (1975). *See also Docket No. 21002*, 71 FCC 2d at 584 n. 27; *Report and Order in Docket No. 21002*, 66 FCC 2d 380, 402 n. 21 (1977). Clearly, the scope of the Commission preemption is not defined by the manner in which a particular cable service is offered to subscribers — *e.g.*, on a tiered or per-channel basis. State regulation of these services, as the Supreme Court has recently noted, "is completely precluded by federal law." *Capital Cities Cable, Inc. v. Crisp*, 52 U.S.L.W. at 4807 (footnote omitted).

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[8] We note, by way of example, that other local jurisdictions have clearly understood our preemption policies. *See, e.g., Community Cable TV, Inc.*, 54 RR 2d at 1353, 1360.

[9] *See also People's Cable Company* (Pittsford, New York), 60 FCC 2d 905, 907 (1976); *Athena Cablevision of Corpus Christi, Inc.* (Corpus Christi, Texas), 59 FCC 2d 1035, 1040, 1044 (1976); *First Report and Order in Docket Nos. 19554 and 18893*, 52 FCC 2d 1, 67 (1975). Each of these cases makes note of the Commission's pre-emption of the field of pay cable and pay television generally.

14. Finally, contrary to petitioners' arguments, we do not believe the alleged uniqueness of particular cablecast services invalidates our decision. It is argued that local regulation results in these particular services gaining access to and remaining on a cable system. Without local regulation, these services become too costly or unavailable to an overall detriment in program service. To the contrary, we believe the very growth in variety and quantity of cablecast services now being offered has been significantly benefited by the policies reiterated in our decision.[10] The tenuous economic basis of many of these "unique" services and the changing compensation mechanisms that have developed in an effort to support them do not suggest the need for increased regulation. Rather, it is the presence of market mechanisms operating between systems and programmers that we believe most likely leads to the growth of program offerings. Either side may attempt at one time or another to withhold its product in an attempt to gain better terms. But, as the policies affirmed in *Brookhaven Cable TV, Inc. v. Kelly, supra*, express, and practical everyday experience over the course of the last decade has demonstrated, allowing market give-and-take to occur without adding government as an additional participant is the better course in fostering development of program services for the public.

15. It has become increasingly accepted, even in more traditional areas of regulation, that unnecessary rate and tariff requirements can "stifle price competition and service and marketing innovation." *Second Report and Order in CC Docket 79-252*, 91 FCC 2d 59, 71 (1982) (citation omitted). That is certainly the case in the present context. Cable program services exist in a competitive and difficult environment. Success is by no means assured for any service now in existence. Indeed, some of the most promising services have already succumbed to the rigors of the marketplace.[11] Others have required changes in the way they are offered. Some may be offered free to systems initially, and then find it necessary to

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[10] As we have previously had occasion to note, "The video program markets supplying programming for cable television use are highly competitive," *Teleprompter Corporation*, 89 FCC 2d 417, 437 (1982). Competition also exists between varying methods of program delivery. *See, e.g., Satellite Television and Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983); *United States v. Columbia Pictures Industries, Inc.*, 507 F. Supp. 412 (S.D.N.Y. 1980), *aff'd*, 659 F.2d 1063 (2d Cir. 1982); *Teleprompter Corporation*, 87 FCC 2d 531, 560-561 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982). For a summary of recent developments in this field, *see Shakeout: The Year in Cable Programming*, Television Digest (1984).

[11] Survival and growth for these services depends on a myriad of complex factors relating to the intensity of demand for the services from subscribers, the total size of the audience accessable, demographic and other factors necessary to attract advertiser support, and competition from substitute services. Since start up losses are almost inevitably significant, entry, exit, rate, and marketing flexibility are of particular importance.

require a per subscriber charge to remain viable. These changes, in turn, require cable systems to maintain enough flexibility to adjust the prices they charge subscribers, or to suspend services that are not desired, or are currently priced too high. Change and experimentation as the market develops is not only economically imperative but publicly beneficial if consumer choice is to be the ultimate determinant of success. Subjecting this dynamic process, at this time, to the regulatory constraints of the more than 15,000 government cable franchising entities distorts market forces and inevitably creates barriers to growth and diversity in the services offered.

16. Because programming is involved, there are also significant first amendment problems raised by efforts to regulate in this area. In the absence of strong evidence that regulation of these services is necessary, these concerns alone weigh heavily against any local regulation. We have found, however, no such evidence of need in our previous considerations of this matter and certainly none is presented in the filings before us in this proceeding.

17. As we noted in our initial decision, this view is entirely consistent with that of the only state cable television regulatory authority of which we are aware that has previously ruled on the matter. In 1980, the Community Antenna Television Commission of the State of Massachusetts concluded that regulations that turned on how particular services were "bundled" together would create "disjunctive practices in the marketplace." *See Community Cable TV, Inc.*, 54 RR 2d at 1360, quoting *Competitive Standard Rulemaking Report and Order*, Docket No. R-4 of the Massachusetts Community Antenna Television Commission (July 25, 1980). It further concluded that specialty programming services were "clearly beyond the jurisdictional reach of [the State] Commission in light of the FCC preemption standards." *Competitive Standard Rulemaking, supra* at 14.

18. Based on the foregoing discussion, *In re Cablevision of Bayonne, supra*, is an erroneous interpretation of Commission policy. Based on our decisions below and today, the law is clear, and no new ruling addressing Cablevision's concerns is necessary. State and local proscriptions purporting to control carriage and placement of broadcast and cablecast signals on cable television systems have been preempted. And, as previously stated, "proposals or agreements contrary to the federal rules are *ultra vires* and of no force or effect." *Report and Order Docket 20272*, 54 FCC 2d 855, 863 (1975). This includes making mandatory that which federal policy has explicitly made optional. *Compare Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982). Although policies

in this area evolved through a step-by-step process,[12] it has been clear for some time that local and state authorities are preempted from regulating "rates, terms and conditions" of pay and other video auxiliary services. *Report and Order in Docket 21002*, 66 FCC 2d 380, 402 n.21 (1977). *See also Capital Cities Cable, Inc. v. Crisp*, 52 U.S.L.W. at 4807. Therefore, Cablevision is free to add, delete, or realign its service as long as the basic service contains all the signals mandated by the Commission's rules. Whatever other legitimate actions the Board may take, it may not interfere with Cablevision's clear right to tier its services as it wishes. Moreover, the Board's concern over the franchise fee is misplaced. The tiering of given signals does not remove them from the revenue base on which a state and/or local government may collect its franchise fee. *See Docket 21002*, 62 FCC 2d at 402-403. Finally, we do not view our action herein as a dramatic departure in any respect from the consistent course we have followed for the past twenty years. We believe that our policy of preemption is both reasonable and in harmony with our desire to assure continued diversity of programming for the viewing public. *See Capital Cities, Inc. v. Crisp, supra.*

19. In view of the foregoing, we find that grant of none of the petitions for reconsideration is in the public interest.

20. Accordingly, IT IS ORDERED, That the request for extension of time filed December 15, 1983, and the "Petition for Reconsideration" filed December 23, 1983, by the City of Dallas ARE DISMISSED.

21. IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed December 15, 1983, by the National League of Cities IS DISMISSED.

22. IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed December 15, 1983, by the Cable Television Information Center IS DENIED.

23. IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed December 15, 1983, by the Public Service Commission of Nevada IS DENIED.

24. IT IS FURTHER ORDERED, That the "Petition for Expedited Special Relief and Declaratory Ruling" (CSR-2622) filed April 25, 1984, by Cablevision of New Jersey and Cablevision Systems Development Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[12] Although the pleadings before us today touch on issues which are also being and have recently been considered by Congress, *see, e.g.*, H.R. 4103, 98th Cong., 2d Sess. (1984); our result today is based specifically upon prior Commission decisions, and is not meant to express a view as to the merits or desirability of any proposed legislation.

Common Carrier, Rates, Charges
Competition, Common Carriers

Fifth Report and Order adopted providing forbearance from tariff and facilities-authorization filings to domestic satellite, miscellaneous common, and digital electronic message service carriers.
—*Competitive Common Carrier*
CC Docket No. 79-252

FCC 84-394

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of	
Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor	CC Docket No. 79-252

FIFTH REPORT AND ORDER

Adopted August 8, 1984; Released: August 27, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

I. Introduction

1. Through a series of notices and orders beginning in 1979, this proceeding has adjusted our tariff and facilities-authorization requirements for nondominant suppliers of domestic, interstate, interexchange telecommunications common carrier services.[1] We have removed regula-

[1] Briefly, our *Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 308 (1979), proposed to reduce or eliminate tariff and facilities applications requirements for carriers subject to effective competition. The *First Report and Order*, 85 FCC 2d 1 (1980), classified common carriers as dominant or non-dominant and applied streamlined regulation to the latter. The *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981), proposed to reduce Title II regulation, through a forbearance or definitional theory, for virtually all common carriers except MTS/WATS and private line service offered jointly by AT&T and the independent telephone companies, and Telex/TWX service offered by Western Union. The *Second Report and Order*, 91 FCC 2d 59, 62 (1982), applied forbearance to resellers of terrestrial common carrier services, and stated that we were analyzing the appropriateness of forbearance with respect to other carriers and that we expected to address those issues in future orders. In affirming that order or reconsideration, 93 FCC 2d 54, 60-61 (1983), we stated that we would consider additional

tory burdens which, in light of market forces, are not necessary to protect customers against unjust, unreasonable, and discriminatory rates. These regulatory burdens imposed costs on customers and impaired efficiency in telecommunications services, contrary to the goals of the Communications Act of 1934, 47 U.S.C. § 151.[2]

2. In this proceeding, we have taken a step-by-step approach through which we have gained experience with selectively lessening regulatory burdens. Carriers subject to full regulation were distinguished from carriers subject to nondominant regulation because the Commission found that the latter lacked market power, *i.e.*, the ability profitably to charge and maintain a supracompetitive price. Nondominant regulation has two categories, streamlined regulation and forbearance. Streamlined regulation involves, *inter alia*, tariff filings in 14-days' notice, a presumption of lawfulness for tariffs, and no required prior Section 214 line-specific approval for any domestic line. Forbearance involves, *inter alia*, no required tariff filings and no required prior Section 214 line-specific approval for any domestic line. Among other requirements, all dominant and nondominant common carriers are required to charge just, reasonable, and nondiscriminatory rates; must comply with our other Title II regulatory policies; are subject to our complaint process, 47 U.S.C. §§ 208-09; and are subject to the Title III requirements for radio licenses. We applied forbearance to those nondominant carriers — resellers and specialized common carriers — for which we were confident that tariff filings were not necessary to promote our statutory goals.[3]

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exercises of our forbearance authority in future orders. Our *Fourth Report and Order*, 95 FCC 2d 554 (1983), extended forbearance to all other resellers and specialized common carriers, and extended streamlined regulation to domestic satellite carriers, miscellaneous common carriers, and facilities-owning interexchange carriers affiliated with exchange telephone companies.

[2] "So long as our regulation imposes costs on some firms, and thus on the public, not exceeded by the benefits generated thereby, the provision of communications service by those firms can never be as 'efficient' nor can the charges be as 'reasonable' as they might be in the absence of such artificial costs." *First Reports*, 85 FCC 2d at 13.

[3] In the *Fourth Report*, 95 FCC 2d at 578, we replaced streamlined regulation of specialized common carriers with forbearance. In support of that decision, we cited the fact that, during the application of streamlined regulation to specialized common carriers, we received only five petitions against their tariff filings. Each allegation of unreasonable rates or other terms of service was found to be without merit. We found little or no likelihood of regulatory problems from forbearance for these carriers. We noted that, under these circumstances, forbearance offers consumers benefits over streamlined regulation of carriers in terms of lower costs and less delay in introducing new offerings and rates, and increased competition. *Id.* at 554-56. No petitions for reconsideration were filed objecting to the application of forbearance to these facilities-based carriers.

3. In this Order, we address petitions for reconsideration of the *Fourth Report and Order*,[4] and petitions for applying forbearance to a domestic satellite carrier (domsat)[5] and a carrier providing Digital Electronic Message Service (DEMS).[6] Also, we examine the application of forbearance to additional categories of carriers. We will address in a separate order the proposal set forth in the *Fourth Further Notice*[7] that carriers subject to forbearance cannot file tariffs at the Commission.

II. Reconsideration of the Fourth Report and Order

4. *Western Union.* In its petition for reconsideration, TRT claimed that Western Union Telegraph Co. (WU) has market power by virtue of its domestic telex/TWX network and should be regulated as a dominant carrier. TRT pointed to WU's postalized (distance insensitive) rates, its 1983 domestic telex rate increases, and the international record carriers' (IRCs') small penetration in domestic telex services as evidence of WU's market power. In opposition to TRT's petition, WU cited the findings in the *Fourth Report* that MTS, WATS, and private line services are demand and supply substitutes for public switched record services. WU claimed that many, if not most, of its potential customers can use alternatives to WU's telex/TWX network. These alternatives include the domestic teletypewriter exchange services of other carriers; facsimile machines, data terminals, or communicating word processors, together with voice or data transmission services; other forms of record communications; private line voice and data services; and switched voice services offered by AT&T and other carriers. WU stated that a recent survey of a sample drawn from its 1000 largest customers disclosed that its revenue from these customers declined from 1980 to 1983 by 60 percent, 28 percent of these customers were using the IRCs for all or part of the tariff that had previously been serviced by WU, and 48 percent of these customers

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[4] We received petitions for reconsideration from Satellite Business Systems (SBS), Allnet Communications Services, TRT Telecommunications Corp., the State of Hawaii, and American Telephone and Telegraph Co. (AT&T). In its petition for reconsideration, AT&T requested that it be regulated as nondominant. The issues of AT&T's market power and the possibility of decreasing our regulation of AT&T have been raised in Long-Run Regulation of AT&T's Basic Domestic Interstate Services, 95 FCC 2d 510 (1983). We expect to address AT&T's petition for reconsideration and the oppositions to it filed by SBS, Allnet, RCA Communications, Association of Data Processing Service Organizations, Independent Data Communications Manufacturers Association, and MCI Telecommunications Corp. in connection with rulemakings flowing from that inquiry. Until some further action, we will continue to regulate all of AT&T Communications' interstate services as dominant.

[5] SBS Petition for Forbearance, CC Docket No. 79-252 (May 25, 1984).

[6] ICOM Petition for Forbearance and Streamlining, and Motion for Expedited Treatment (May 9, 1984); FCC Public Notice, 49 Fed. Reg. 22,837 (June 1, 1984). The Public Notice requested comments on applying forbearance to all DEMS carriers.

[7] 49 Fed Reg. 11856 (March 28, 1984).

migrated to intra-company telecommunications systems. As for its postalized rates, WU stated that its costs are basically distance insensitive, this rate structure is the norm for record communications carriers, and Graphnet and ITT-DTS employed postalized rates before WU. Finally, WU noted that its earnings were still deficient after the 1983 rate increase.

5. We have received no petitions opposing the tariffs of, or meritorious formal complaints against,[8] WU since it became subject to streamlined regulation in November 1983. For the reasons stated in the *Fourth Report*[9] and WU's Opposition, we affirm our finding that WU is nondominant in its domestic, interstate, interexchange services. These services of WU have close demand and supply substitutes. The evidence indicates that WU faces strong competition for these services with regard to a substantial portion of its potential customers, and that it lacks the ability profitably to raise its rates above the competitive level for its services. These customers can turn to a number of suppliers of voice, record, or data services — including AT&T — to meet their communications demands. WU's domestic, interstate, interexchange services are in the relevant market of domestic, interstate, interexchange telecommunications services defined in the *Fourth Report*, and WU has a small share thereof. To facilitate compliance with the equal-interconnection requirements of the Record Carrier Competition Act and in light of the tariff-filing requirements of the Commission's interim implementation order,[10] we continue at this time to treat the domestic, interstate, interexchange services of WU and all record carriers covered by the interconnection requirements of that Act under streamlined regulation rather than forbearance. That is, these carriers must continue filing tariffs for the

[8] We dismissed as nonmeritorious two complaints against WU's billing and settlement practices for domestic handling of in-bound telex international traffic. RCA Global Communications and Western Union International v. Western Union, Mimeo No. 3285 (April 3, 1984). We have one outstanding petition for declaratory ruling, filed by ITT World Communications, Inc., on August 11, 1983, regarding WU's prices for its combined basic and enhanced services packages.

[9] 95 FCC 2d at 564-66, 571-72. For the year ending June 30, 1983, WU's telex/TWX total operating revenues were $288 million, and WU's total operating revenues from all its regulated services were $697 million. WU's Return on Investment Report filed with the Commission (December 14, 1983). In 1983, AT&T Communications' interstate revenues were $30.4 billion. AT&T's Interstate Monthly Report No. 1 (December 1983).

[10] *See* 95 FCC 2d at 578; 47 U.S.C. §222; Interconnection Arrangements Between and Among the Domestic and International Record Carriers, 89 FCC 2d 928, 91 FCC 2d 483 (1982), *aff'd in relevant part sub nom.* Western Union v. FCC, 729 F.2d 811 (D.C. Cir. 1984). The equal-interconnection provisions of the Record Carrier Competition Act do not sunset. If our tariff-filing requirements for the domestic services of the international record carriers change, we will consider applying forbearance rather than streamlined regulation to their domestic services.

domestic services covered by the interconnection requirements of that Act. We deny TRT's petition for reconsideration.

6. *Affiliates of Exchange Carriers.* In the *Fourth Report*, 95 FCC 2d at 575-79, we decided that the domestic, interexchange, interstate services of all carriers affiliated with exchange telephone companies should be regulated as nondominant. Furthermore, we applied forbearance to GTE Sprint (based on our experience in applying streamlined regulation to it) and to resellers affiliated with exchange telephone companies. In that order, we applied streamlined regulation to the rest of these affiliated carriers. Allnet's petition for reconsideration argued that the Commission should protect against improper cross-subsidization from exchange telephone companies' monopoly services to their interexchange services. Allnet proposed that the Commission should prohibit exchange telephone companies from offering interexchange services. Alternatively, Allnet proposed to require structural separation between exchange telephone companies and their interexchange affiliates, and to regulate the interexchange affiliates as dominant. ISACOMM, a subsidiary of United Telecommunications, supported the application of forbearance to interexchange carriers affiliated with exchange telephone companies, and stated that Allnet's attempt to prohibit or impose separation requirements on such carriers is beyond the scope of this proceeding. American Satellite, which is structurally separated from its affiliate, Continental Telephone Corp., opposed Allnet's proposal that it be subject to additional restrictions, and requested that forbearance be extended to it.

7. Several of our decisions have pointed to our concerns about potential cost-shifting and anticompetitive conduct by exchange telephone companies.[11] Of course, the divestiture of the Bell Operating Companies from AT&T and the structural separation of several large independent exchange telephone companies with affiliated interexchange carriers help meet our regulatory goals. *See* notes 20 and 23 *infra.* Additionally, with regard to affiliated interexchange carriers, we have regulatory tools to inhibit cost-shifting and anticompetitive conduct by exchange telephone companies. Exchange telephone companies are required to interconnect with all interexchange carriers and private systems on just, reasonable, and nondiscriminatory terms.[12] Interstate exchange access services are

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[11] *See generally* BOC Separation Decision, 49 Fed. Reg. 1190 (January 10, 1984), *recon.*, FCC 84-252 (released June 1, 1984), *aff'd sub nom.* Illinois Bell Tel. Co. v. FCC, ____ F.2d ____ (7th Cir. 1984); Second Computer Inquiry, 77 FCC 2d 384, *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Indus. Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2107 (1983); GTE/SPCC Acquisition, 94 FCC 2d 235 (1983); Application of C & P Tel. to Construct Digital Termination Systems, FCC 84-178 (released May 11, 1984).

[12] *See* Bell System Tariff Offerings, 46 FCC 2d 413, 428, *aff'd sub nom.* Bell Tel. Co. of Penn. v. FCC, 503 F.2d 1250 (3rd Cir. 1974); AT&T: Offer of Facilities to Other Common

regulated as dominant and subject to full tariff review.[13] We review the interstate exchange access tariffs filed by exchange telephone companies with the policy goals of achieving reasonable revenue requirements, cost-based rates, and just, reasonable, and nondiscriminatory terms and conditions. Unreasonable bundling of exchange and interexchange services is unlawful; so, too, is unreasonable discrimination by an exchange telephone company in favor of any interstate interexchange carrier.[14] Other facilities-based carriers and resellers should be able to use exchange facilities on the same terms and conditions as do interexchange carriers affiliated with exchange telephone companies. We have investigated carefully the switched and special exchange access tariffs to protect against provisions by which an affiliate of an exchange telephone company or any other interexchange carrier would be favored by discrimination. Our compliant process is available for any allegations of such discrimination. Also, the interexchange carriers that are affiliated with exchange telephone companies and that are treated as nondominant[15] have small market shares.[16] We have received no petitions

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Carriers, 92 FCC 2d 46, *mod.*, FCC 83-550 (released December 12, 1983); Lincoln Tel. & Tel. Co., 72 FCC 2d 724 (1979), *aff'd*, 659 F.2d 1092 (D.C. Cir. 1981); AT&T: Restrictions on Interconnection of Private Line Services, 60 FCC 2d 939 (1976); Fort Mill Tel. Co. v. FCC, 719 F.2d 89 (4th Cir. 1983); AT&T: Interconnections with Private Interstate Communications Systems, 71 FCC 2d 1 (1979) (ARINC); AT&T: 1.544 Mbps Channels for Connection with Private Interstate Communications Systems, Mimeo No. 636 (released November 8, 1983).

[13] *Fourth Report*, 95 FCC 2d at 576.

[14] *See generally* 47 U.S.C. § 202; ECA Tariff Order, FCC 84-51 (released February 17, 1984); Private Line Rate Structure and Volume Discount Practices, 49 Fed. Reg. 18107 (April 27, 1984); MTS and WATS Market Structure (CC Docket No. 78-72, Phase I), 93 FCC 2d 241, *recon.*, FCC 83-356 (released August 21, 1983), *further recon.*, FCC 84-36 (released February 15, 1984). In our approval of GTE Corp.'s acquisition of Southern Pacific Communications Co., we concluded: "We also do not find reason for concern that the transfer is likely to give SPCC/SPSC a preference over other interexchange carriers . . . . The potential for unequal treatment will be greatly diminished, if not eliminated, with the implementation of our access charge plan . . . . [I]nterested parties will have the right to petition against these tariff filings and bring to our attention any proposed tariffs they believe likely to result in an unjust discrimination or preference." GTE/SPCC Acquisition, 94 FCC 2d 235, at 255 (1983). In United Telecom./U.S. Telephone Acquisition, FCC 84-272 (released June 20, 1984), we required United to make available access arrangements on the same terms and conditions to all Other Common Carriers, including its affiliate.

[15] For the reasons stated in note 33 *infra*, we regulate as dominant Alascom Inc., a subsidiary of Pacific Telecom., Inc., which owns exchange telephone companies. By the *Fourth Report*, all other interexchange carriers affiliated with exchange telephone companies are nondominant. But see note 23 *infra* regarding the Bell Operating Companies.

[16] *Fourth Report*, 95 FCC 2d at 575. In 1983, AT&T Communications had interstate revenues of $30.4 billion; GTE Sprint had interstate revenues of $740 million; U. S. Telephone (now affiliated with United Telecom.) had interstate revenues of $13 million;

opposing the tariffs of interexchange carriers affiliated with exchange telephone companies since the *Fourth Report*, and the only formal complaint filed against an affiliated interexchange carrier concerns billing for calls after five rings even though the calls are not completed.[17] If we find that particular interexchange carriers affiliated with exchange telephone companies have market power or otherwise pose regulatory problems, we could require them to file facilities applications and tariffs subject to dominant regulation, or impose other conditions.

8. Interexchange carriers affiliated with exchange telephone companies have increased competition in interstate interexchange services[18] and thereby benefitted consumers through lower-priced services and new offerings. While structural separation decreases opportunities for cost-shifting and anticompetitive conduct, it can also decrease efficiency and affect the interexchange carrier's ability to compete. In the *Second Computer Inquiry*, we stated our commitment to the minimum necessary degree of separation.[19]

> To the extent there may be efficiencies within [carriers'] structures they should not be precluded from capitalizing on them where countervailing regulatory considerations do not demand stringent separation.

While restrictions on interexchange services offered by the Bell Operating Companies (BOCs) and GTE have developed out of antitrust proceedings,[20] we have not previously prohibited exchange telephone companies from providing interexchange common carrier services, or required full structural separation for such activities for all exchange telephone companies.[21] We will consider the problems posed by individual carriers regarding cost-shifting and anticompetitive conduct and may impose restrictions in particular cases, but we see no evidence at this time that

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and American Satellite had interstate revenues of about $66 million. AT&T's Interstate Monthly Report No. 1 (December 1983); data filed with the Commission pursuant to 47 C.F.R. § 67.121; United Telecom./U.S. Telephone Acquisition, *supra*; AT&T Comments in CC Docket No. 83-1147, Appendix A (April 2, 1984).

[17] Bill Correctors, Ltd. v. GTE Sprint, E-84-18. We have not yet decided the merits of this complaint. Similar complaints were filed against MCI, Lexitel, United States Transmission Systems, and Allnet. Pursuant to the *Fourth Report*, all these carriers are subject to forbearance.

[18] *Fourth Report, supra*, 95 FCC 2d at 572-73, 576; *GTE/SPCC Acquisition, supra*, 94 FCC 2d at 251-62; *United Telecom./ U.S. Tel. Acquisition, supra.*

[19] 77 FCC 2d at 476.

[20] The Modification of Final Judgment (MFJ) limits the ability of the BOCs to offer interexchange services. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). *See also* n. 23 *infra.* Also, the proposed consent decree agreed to by GTE and the U.S. Justice Department (Civ. Action No. 83-1298, D.D.C.) would require structural separation between the GTE operating companies and Sprint. GTE/SPCC Acquisition, *supra*, 94 FCC 2d at 240. We do not express any opinion here on the reasonableness of these restrictions.

[21] *See United Telecom., supra.*

imposing such restrictions on all exchange telephone companies would be necessary to protect competition and promote reasonable rates. Accordingly, neither of Allnet's proposals appears warranted to protect the public interest at this time, and we deny Allnet's petition. Nevertheless, our concerns about cost-shifting and anticompetitive conduct by exchange telephone companies led us to require in the *Fourth Report* a certain amount of separation between exchange telephone companies and affiliated interexchange carriers which are regulated as nondominant. In response to informal requests for clarification, these standards are explained in the next paragraph.

9. The *Fourth Report* made domestic, interstate, interexchange resellers *affiliated* with exchange telephone companies subject to forbearance; facilities-owning domestic, interstate, interexchange carriers *affiliated* with exchange telephone companies were placed under streamlined regulation.[22] We hereby explain what we meant by an "affiliate" of an exchange telephone company for purposes of qualifying for regulation as a nondominant carrier. A carrier affiliated with an exchange telephone company is a carrier that is owned (in whole or part) or controlled by, or under common ownership (in whole or part) or control with, an exchange telephone company. We seek to avoid imposing excessive burdens in establishing conditions for when a carrier affiliated with an exchange telephone company qualifies for forbearance, because such burdens would lessen competition and impose costs on consumers. *See* para. 10 *infra.* In order to provide some, albeit not complete, protection against cost-shifting and anticompetitive conduct, an exchange telephone company's affiliate qualifying for nondominant treatment must have separate books of account, and must not jointly own transmission or switching facilities with that exchange telephone company. If the affiliate uses the exchange telephone company's services, it should acquire them via the exchange telephone company's tariffs. An affiliate qualifying for nondominant treatment is not necessarily structurally separated from an exchange telephone company in the sense ordered in the *Second Computer Inquiry*, 47 C.F.R. § 64.702 (*e.g.*, fully-separated personnel and marketing are not necessary for nondominant regulation).[23] Interstate services

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[22] 95 FCC 2d at 575-76, 579.

[23] We required that the BOCs employ structural separation for the provision of customer-premises equipment (CPE) and enhanced services. *BOC Separation Decision, supra.* The BOCs currently are barred by the MFJ from providing interLATA services. *See* United States v. Western Electric Co., Civ. Action No. 82-0192 (D.D.C. July 26, 1984). If this bar is lifted in the future, we would regulate the BOCs' interstate, interLATA services as dominant until we determined what degree of separation, if any, would be necessary for the BOCs or their affiliates to qualify for nondominant regulation. We have not required structural separation for the other exchange telephone companies' CPE activities and enhanced services. For these exchange telephone companies, our

provided directly by exchange telephone companies (not through affiliates) are regulated as dominant.

10. Finally, we address the issue of forbearance for all the domestic, interstate, interexchange services of carriers affiliated with exchange telephone companies. There are three reasons to extend forbearance to these carriers and others. First, we found earlier that, if we are reasonably confident that our complaint process and market forces are sufficient to check a carrier's ability profitably to charge unlawful rates, consumers benefit from forbearance rather than streamlined regulation.[24] Forbearance can reduce the costs and delay of a carrier introducing new services or changing rates. This promotes the ability of carriers to satisfy consumers' demands faster and at lower rates. In addition, forbearance facilitates the entry of new carriers and new offerings designed to meet changing market conditions. Also, forbearance can benefit consumers by stimulating competition. Forbearance can stimulate competition by facilitating entry, price decreases, and improved offerings, and by decreasing the disclosure of competitively-sensitive information to rival carriers. Second, we have had favorable experience[25] in applying forbearance to

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treatment of their nondominant interstate, interexchange services would be similar to our treatment of their CPE activities and enhanced services, primarily separate books of account but not structural separation. As noted *supra*, GTE currently employs structural separation between Sprint and the GTE exchange telephone companies, and Continental employs structural separation between American Satellite and the Continental exchange telephone companies. Furthermore, United Telecom. employs structural separation between its interstate, interexchange carriers and its exchange telephone companies. *United Telecom., supra.* While we recognize that this structural separation by these large exchange telephone companies providing interstate, interexchange services impedes cost-shifting and anticompetitive conduct, it appears that a similar requirement for all smaller exchange telephone companies would be unreasonably burdensome. *See Illinois Bell, supra*, slip op. at 19 ("most of the independent companies, apart from GTE, are quite small firms that might find it very costly to establish separate subsidiaries to market customer equipment").

[24] *See Second Report*, 91 FCC 2d at 72-73, *recon.*, 93 FCC 2d at 56, 60; *Fourth Report*, 95 FCC 2d at 555-56, 577-79. While we have not been able to quantify the benefits and costs discussed here, we believe that they are substantial. In the *Further Notice*, 84 FCC 2d at 453-55, we described the effects of prior review of tariffs and required tariff filings in terms of (1) taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (2) impeding and removing incentives for competitive price discounting; (3) imposing costs on carriers that attempt to make new offerings; and (4) increasing the costs of the Commission's operations. All of these effects can harm consumers through higher prices and services which do not meet their needs.

[25] The D. C. Circuit Court of Appeals once referred to "the kind of issue [involving expert opinions and forecasts of the effects of a regulation on business] where a month of experience will be worth a year of hearings . . . . [I]t is the obligation of an agency to make re-examinations and adjustments in the light of experience." American Airlines, Inc. v. CAB, 359 F.2d 624, 633 (D. C. Cir.), *cert. denied*, 385 U.S. 843 (1966). *See also* Geller v. FCC, 610 F.2d 973, 978 n.39, 980 (D.C. Cir. 1979) (the FCC has the "affirmative

most resellers since August 1982[26] and to all other resellers and specialized common carriers since November 1983. The only formal complaints we have received against carriers subject to forbearance involve the practice of charging customers after five rings even though the call is not completed.[27] Third, during the nine months that facilities-owning interexchange carriers affiliated with exchange telephone companies, miscellaneous common carriers, and domestic satellite carriers have been subject to streamlined regulation, the Commission has received no petitions opposing their tariffs or formal complaints against them.

11. Therefore, we find that it would be in the public interest to apply forbearance to all the domestic, interstate, interexchange services of carriers affiliated with exchange telephone companies.[28] However, we require all of these carriers owning transmission lines to file the semi-annual reports on circuits added provided for by 47 C.F.R. § 63.07. This information will contribute to the completeness of our data on the telecommunications industry's structure and help us mold our regulation of common carriers to serve the public interest.[29]

12. *Domestic Satellite Carriers.* SBS' petition for reconsideration requested forbearance rather than streamlined regulation for its domestic, interstate, interexchange services. SBS stated that its specialized-common-carrier and reseller competitors are subject to forbearance and thereby gain a competitive advantage, and that there has been only a single complaint against a SBS tariff filing in over 200 filings.[30]

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duty to ascertain whether [our] regulations still serve [] some aspect of the public interest").

[26] *See* comments of AT&T in CC Docket No. 83-1147 at 25 (more than 400 resale carriers have entered). It appears that at least some of these carriers would not have entered and expanded their services if we required tariff filings (involving costs, delays, and uncertainty about the results of our tariff review) and prior certification as common carriers (again involving costs, delay, and the specter of regulatory entanglements).

[27] *See* note 17 *supra.*

[28] In the *Fourth Report*, 95 FCC 2d at 579, we stated: "We may extend forbearance treatment to other categories of non-dominant carriers in the future after observing the costs and benefits of streamlined regulation of different categories of carriers. Within 18 months after issuance of this Order, we will review our experience and decide whether to continue applying streamlined regulation to carriers we today classify as non-dominant." We find that this revision is warranted at this time for the reasons stated in para. 10 *supra.* By this action, we grant the requests for forbearance of ISACOMM and American Satellite. Earlier commenters in this proceeding also requested forbearance for carriers affiliated with exchange telephone companies. *See, e.g.,* Comments of Central Telephone and Utilities Corp. (April 28, 1981).

[29] *See* Long-Run Regulation of AT&T's Basic Domestic Interstate Services, *supra*; *Fourth Report*, 95 FCC 2d at 578.

[30] The challenged tariff, filed before we applied streamlined regulation to SBS, involved a proposed auction in connection with its offering of transponder capacity service. SBS subsequently withdrew the auction provision from its tariff.

Comments of GTE Spacenet Corp., GTE Satellite Corp., and American Satellite Co. support forbearance for all domsats. These comments cite the costs and delays related to filing tariffs, and the anticompetitive consequences of having tariffs on file. GTE Satellite noted that none of its tariff filings encountered an opposing petition, and urged expeditious application of forbearance to domsats. No party opposed our finding that domsats are nondominant carriers or opposed SBS' petition for forbearance. Subsequent to its petition for reconsideration, SBS petitioned for forbearance by waiver under para. 37 of the *Fourth Report.*[31]

13. Regarding another proceeding by which we decreased regulatory burdens on domsats, in June 1984 the D.C. Circuit Court of Appeals affirmed our *Transponder Sales* order.[32] This order recognized that domsats do not possess the market power required to impair the reasonable availability of transponder supply, and that the public interest would not be served by tariff regulation of all transponder uses. Accordingly, our decision authorized transponder sales on a non-common carrier basis. In similar recognition of domsats' lack of market power, we applied streamlined regulation to them in the *Fourth Report* and stated that our experience with such regulation might later lead us to apply forbearance to them. For the reasons stated in paras. 10-11 *supra* (including our experience in regulating domsats by streamlined regulation) and in the petitions and comments cited in para. 12 *supra*, we find that the costs/benefits of forbearance are more in the public interest than those of streamlined regulation for domsats. We hereby replace streamlined regulation of domsats' domestic, interstate, interexchange services with forbearance.[33] However, we retain our Title III regulation of

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[31] The *Fourth Report* delegated to the Common Carrier Bureau the authority to apply forbearance to a nondominant carrier on a case-by-case basis. 95 FCC 2d at 579.

[32] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.* Wold Communications v. FCC, ____ F. 2d ____ (D.C. Cir 1984). The Court concluded that "the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances." slip op. at 22.

[33] A recent report states that there are a substantial number of inactive domestic transponders and that transponder capacity has grown faster than demand. *Transponder Loading Report*, Satellite Week (August 6, 1984) 1-3. However, we will regulate one domsat, Alascom, as dominant. Alascom benefits from the Commission's rate-integration policy for interstate MTS and WATS services to noncontiguous domestic points. Establishment of Domestic Communications Satellite Facilities, 35 FCC 2d 844, 856, 38 FCC 2d 665 (1972), *aff'd sub nom.* Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975); Integration of Rates and Services, FCC 83-606 (released January 5, 1984). This policy has led us to inquire into the ability of carriers not receiving rate-integration payments, such as General Communications Inc., to compete in serving Alaska. The current rate-integration arrangements and state of competition warrant regulation of Alascom as dominant. Also, we will continue to regulate the services of AT&T Communications using satellite facilities as dominant. *See* para. 18 *infra*. The domestic services of

domsats, the process for certification of non-common carrier domsat systems established in *Transponder Sales*, and the semi-annual reporting requirements on circuits added (47 C.F.R. §63.07) for domsats. Included within our decision to apply forbearance to domsats are grants of SBS's petitions.

14. *Miscellaneous Common Carriers.* Under the *Fourth Report*, miscellaneous common carriers (MCCs) were found nondominant and made subject to streamlined regulation.[34] We stated that our experience with streamlined regulation of MCCs might later lead us to apply forbearance to them. In June 1984 the Common Carrier Bureau granted Southern Satellite's motion to regulate its MCC services by forbearance; the Bureau found that forbearance for these services was more in the public interest than streamlined regulation.[35] For the reasons stated in paras. 10-11 *supra* (including our experience in regulating MCCs by streamlined regulation), we find that the costs/benefits of forbearance are more in the public interest than those of streamlined regulation for all MCCs. We hereby replace streamlined regulation of MCCs' domestic, interstate, interexchange services with forbearance. We retain our Title III regulation of MCCs. Also, MCCs will be subject to the semi-annual reporting requirement on circuits added (47 C.F.R. §63.07).

15. *Hawaii.* The State of Hawaii requested the Commission to require GTE Sprint Communications Corp. to file tariffs or some other reports so as to assure compliance with the conditions in the *GTE/SPCC Acquisition* order[36] regarding rate and service integration. The State of Hawaii recognizes that satisfying its concerns does not require that GTE Sprint file tariffs at the Commission. GTE Sprint responded that requiring it to file tariffs would reduce its ability to compete and is unnecessary to assure compliance with the conditions in that order. Currently, despite our application of forbearance to GTE Sprint, this carrier has tariffs on file at the Commission. These tariffs should provide the information necessary to check on GTE Sprint's compliance with the rate-and-service integration conditions. In case at some future time GTE Sprint no longer has tariffs on file with sufficient information to address the State of Hawaii's concerns, we require that GTE Sprint make reasonably available sufficient information about its rates and services so that the State of Hawaii

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Communications Satellite Corp. have not been analyzed in this proceeding and, until further action, we will continue to regulate them as dominant. *Notice*, 77 FCC 2d at 311 n. 6.

[34] 95 FCC 2d at 566-67, 575. Earlier comments in this proceeding requested that we apply forbearance to MCCs. *See, e.g.*, Comments of United Video and Comments of Western Tele-Communications (filed April 28, 1981).

[35] Southern Satellite Systems: Petition for Waiver of Certain Common Carrier Regulations, Mimeo No. 4875 (released June 19, 1984).

[36] 94 FCC 2d 235 (1983).

and the Commission can ascertain whether the carrier is complying with these conditions. Thus, we grant the State of Hawaii's petition. However, we do not require that such information be filed at the Commission unless we specifically request it. We do not believe that it is necessary for us to specify the format or contents of such information at this time. Nor do we, at this time, specify the means by which GTE Sprint could make the information reasonably available.

16. *Initial Certification.* The present rule regarding Section 214 authority for nondominant carriers, 47 C.F.R. §63.07, requires revision so that the language complies with our orders in this proceeding. After the amendments ordered in the *Fourth Report*, the rule states, *inter alia*, that certain filings are necessary for a nondominant carrier to obtain initial certification to become an interstate communications common carrier, or to construct lines by cable. We have previously ordered that carriers subject to forbearance are not required to make filings under Section 214.[37] Accordingly, we eliminate the language providing for these filing requirements, but maintain the semi-annual reports on initial circuits and circuits added. The revisions to Part 63.07 are shown in the attachment.

17. *Mixed Characteristics.* Finally, we turn to the provisions of the *Fourth Report* regarding carriers with mixed characteristics, such as a carrier providing international services (subject to full regulation), domestic record carrier services with international interconnections (subject to streamlined regulation), and domestic resale services (subject to forbearance).[38] Para. 37 of that Order stated that a carrier with mixed characteristics but "separate affiliates" for its various services could be subject to different levels of regulation among its affiliates. On the other hand, we stated that for a single entity with mixed characteristics, all of its services would be subject to the heaviest burden of regulation applicable to any of its services. The concept of "separate affiliate" has caused confusion. This concept was intended to ease the administration of different amounts of regulation for different carriers during this period in which we are evaluating the competition faced by certain carriers in some

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[37] *Second Report*, 91 FCC 2d at 73. Generally, it is contrary to Commission policy to limit entry of common carriers. *See* Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *aff'd sub nom.* Washington Utilities and Transportation Comm'n. v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); Domestic Communications Satellite Facilities, 35 FCC 2d 844 (1972); MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (Execunet I); MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (Execunet II). Also, it is unnecessary to control investments in lines as a means of regulating nondominant carriers' rate bases. We have concluded that nondominant carriers lack the ability profitably to charge unjust or unreasonable rates.

[38] 95 FCC 2d at 579.

or all of their services. It was not intended to require that a carrier with mixed characteristics form structurally-separated subsidiaries in the sense ordered in the *Second Computer Inquiry* in order to benefit from some streamlined regulation or forbearance. Nor was it intended to encourage carriers to balkanize their operations.[39]

18. In the case of exchange telephone companies, the requirement of a separate affiliate for nondominant treatment is warranted by our concerns about cost-shifting, discriminatory exchange access, and the dominance of exchange telephone companies in exchange services. *See* para. 9 *supra*. Similarly, concerns about cost-shifting and anticompetitive conduct lead us to regulate all of the common carrier services of AT&T Communications as dominant at this time.[40] However, we believe that these concerns are not as great with regard to other carriers regulated as dominant.[41] For these other dominant carriers, the costs of requiring a separate affiliate (including higher operational costs from a balkanized supply of services and the possibility that some integrated services will not be offered) do not seem justified by regulatory concerns. We find that the information required on the title page of every tariff and tariff revision should be sufficient to identify whether the tariff includes a service covered by full regulation, streamlined regulation, or forbearance (if the carrier chooses to file a tariff for a service subject to forbearance). Under 47 C.F.R. §61.54(b), the title page must contain a brief statement showing each class of service provided therein and the geographical application of the tariff or supplement. A tariff or tariff revision covering a carrier's mix of services, some subject to full regulation and some subject to nondominant regulation, must be filed with the notice period

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[39] *See* Southern Satellite Systems, *supra*; Comments of GTE Sprint on ICOM Petition at 2.

[40] The basic services of AT&T Information Systems are subject to forbearance. AT&T: Provision of Basic Services Via Resale by Separate Subsidiary, 49 Fed. Reg. 28,835 (July 17, 1984). AT&T Information Systems is structurally separated from AT&T Communications.

[41] After this Order, dominant regulation applies to, *inter alia*, (1) the international services of carriers, (2) exchange services of carriers, (3) AT&T, Communications, and (4) providers of domestic public land mobile radio services, public coast maritime mobile radio services, multipoint distribution services, and cellular mobile radio services, 95 FCC 2d at 582. We have not yet examined the market power of the carriers described in (4). Many of the carriers described in (4) are small and their ability to engage in anticompetitive conduct or cost-shifting appears limited. Pending our review of their market power, the costs of requiring them to establish and operate through separate affiliates to qualify for non-dominant treatment for services that have been classified as non-dominant appear to outweigh the likely benefits. As for the international record carriers, the equal-interconnection requirements of the Record Carrier Competition Act appear to limit potential anticompetitive conduct and cost-shifting, again making separate affiliates unattractive with regard to our regulatory goals. All common carrier services provided by Communications Satellite Corp. are regulated as dominant. *See* note 33 *supra*.

required for full regulation but with cost support only for the services covered by full regulation. If a tariff includes a mix of services and a revision to the tariff covers only services subject to nondominant regulation, the tariff revision may be filed on 14-days' notice and without cost support. These procedures replace the "separate affiliate" provisions of the *Fourth Report* except for carriers affiliated with exchange telephone companies.

III. Forbearance for DEMS Carriers

19. In 1981 the Commission allocated radio spectrum for nationwide common carrier digital transmission networks (DEMS systems) providing high-speed, two-way transmissions.[42] We anticipated that DEMS systems would be used for document distribution, data communications, and teleconferencing. The intercity links of these networks employ satellite, microwave, fiber optics, or cable facilities, and their intracity facilities include digital termination systems (DTS) and internodal links.[43] Each DTS is a component of a DEMS network. We have allocated 23 channels at 10.6 and 18 GHz for DTS operations in each major city (SMSA), with 14 channels for common carriage.[44] As of May 1984, we have granted approximately 600 construction permits for DTS.

20. In the *Fourth Report*, we noted that the possible nondominance of DEMS carriers had not yet been considered in the *Competitive Carrier Rulemaking*.[45] In May 1984 ICOM filed a petition requesting forbearance treatment for its DEMS, but recommending that we consider DEMS operators' requests for nondominant treatment on a case-by-case basis. ICOM's proposed DEMS system would serve 53 cities in 31 states for voice, data, and facsimile transmissions. ICOM expected that its proposed network will cost about $18.3 million, and that it will face competition from specialized common carriers, private microwave and fiber optic systems, cable television operators, AT&T, WU, value-added resale carriers, domsats, and other DEMS carriers.[46] Our Public Notice[47] requested comments on the application of streamlined regulation or

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[42] DEMS, 86 FCC 2d 360, 360-61 (1981) (First Report), *petition for review denied sub nom.* Alascom Inc. v. FCC, 727 F.2d 1212 (D.C. Cir. 1984); FCC 83-392 (released September 30, 1983) (Second Report).

[43] *See* Local Area Telecommunications, Tariff F.C.C. Nos. 1 (filed March 16, 1983) and 2 (filed February 20, 1984) (DEMS); ISACOMM, Tariff F.C.C. No. 3 (filed October 19, 1983) (DTS).

[44] Application of C & P Tel., *supra*, at para. 5. Of the 13 channels at 10.6 GHz, seven are for extended networks (30 or more cities) and six are for limited networks (1 to 29 cities).

[45] 95 FCC 2d at 582.

[46] ICOM Petition, *supra*, at 6, 8.

[47] *See* note 6 *supra*.

forbearance to DEMS carriers or services generally.[48]

21. We find that the domestic, interstate, interexchange services provided via DEMS have close substitutes. Customers considering DEMS for data, voice, facsimile, or video transmissions have a wide variety of services and suppliers capable of meeting their needs. Instead of using DTS for origination and termination, close substitutes can use switched and special exchange access services offered by exchange telephone companies via wire pair, coaxial cable, microwave, or fiber optics. Or, they can originate and terminate directly to customers' premises using these transmission media or satellite earth stations. DEMS carriers would use the same intercity transmission services as a large number of non-dominant carriers and AT&T. Because of demand and supply substitutability, we find that providers of domestic, interstate, interexchange DEMS services are in the relevant product and geographic markets identified in the *Fourth Report*. None of the commenters in this proceeding dispute this finding.

22. Furthermore, a DEMS carrier offers a new service and will have only a miniscule share of this market.[49] Most directly, the current spectrum allocation and licensing policy provides that any one DEMS common carrier service faces actual or potential competition from 13 other DEMS common carrier services and services using 9 private DTS frequencies. ICOM's estimate that it will cost only $18.3 million for it to construct facilities for its DEMS evidences relatively low cost barriers to entry. Moreover, DEMS carriers compete with established carriers and

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[48] Digital Termination Service, Inc., Contemporary Digital Services, Inc., and Local Area Telecommunications, Inc., support forbearance for DEMS provided by all carriers. GTE Sprint and ISACOMM support forbearance for DEMS carriers otherwise eligible for forbearance, and streamlined regulation for DEMS carriers otherwise eligible for streamlined regulation. Tymnet D.T.S., Inc. argued that all DEMS providers offering interstate, domestic, interexchange telecommunications services on a nationwide basis should be subject to streamlined regulation, and that forbearance would be premature until the Commission gained experience in streamlined regulation of DEMS. SBS stated that all similarly-situated non-dominant DEMS carriers should be subject to the same regulatory treatment, and that the Commission should preempt any contrary state regulation. The Association of Long Distance Telephone Companies did not take a position of non-dominant treatment of DEMS, but stated that DEMS carriers should be required to file tariffs with the Commission and must not prohibit resale. Finally, AT&T argued that DEMS should be subject to forbearance when offered by any carrier, including AT&T. SBS, MCI, GTE Sprint, and ISACOMM claimed that the Commission lacks specific information about how AT&T intends to use DTS/DEMS, and that AT&T's request should not be considered in this proceeding. ICOM was renamed as Dama Telecommunications Corp. (DamaNet).

[49] In Nationwide Paging, FCC 84-148, at 8-9 (released May 24, 1984), we found that newly-authorized national paging networks will be nondominant and applied forbearance to them.

new entrants using other transmission technologies.[50] In addition, while our experience with DEMS tariffs has been limited,[51] we have not received any petitions against the DEMS tariffs that have been filed or formal complaints regarding any DEMS service. We conclude that, with two exceptions explained in para. 24 *infra*, all providers of domestic, interstate, interexchange DEMS services should be regulated as nondominant for these services.[52]

23. Finally, we find that forbearance will help promote the entry and expansion of DEMS by relieving carriers of the costs and delay of required tariff filings, and will help promote competition. These developments will benefit consumers. *See* para. 10 *supra*. In many cases, it is more costly for a new carrier to prepare and file its first tariff than any subsequent tariff. The benefits of forbearance over streamlined regulation can be especially great for new carriers. In applying forbearance to DEMS carriers, we are confident that market forces and our complaint process will be sufficient to ensure that these carriers charge just, reasonable, and nondiscriminatory rates. We can impose a requirement of tariff filings and cost support if our experience with DEMS carriers indicates that these regulatory burdens are warranted. For these reasons we reject Tymnet's contention that we should apply streamlined regulation to DEMS rather than forbearance at this time. Under forbearance, providers of DEMS offerings must charge just, reasonable, and nondiscriminatory rates; DEMS providers must obtain radio licenses under Title III and comply with the procedures and filing requirements we established in General Docket No. 79-188;[53] DEMS services are subject to our complaint process; DEMS providers must file semi-annual reports on their construction progress, 47 C.F.R. § 21.43, and on their initial and additional lines, 47 C.F.R. § 63.07; and DEMS services must comply with our Title II regulatory policies, including those requiring reasonable, nondiscriminatory interconnections[54] and prohibiting resale restrictions.[55] We apply dominant regulation to intraexchange services provided via DTS, including intraLATA, interstate DTS services of BOCs.[56] Also, we apply

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[50] *See* note 15 *supra*.

[51] *See* note 43 *supra*.

[52] Para. 18 *supra* explains how carriers with mixed characteristics would have their DEMS services subject to nondominant regulation.

[53] *See* note 42 *supra*.

[54] Application of C & P Tel., *supra*, at 9 & n.14.

[55] *See* Resale and Shared Use, 60 FCC 2d 261 (1976), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 895 (1978); Resale and Shared Use of Domestic Public Switched Network Services, 83 FCC 2d 167 (1980).

[56] Application of C & P Tel., *supra*; Fourth Report, *supra*, 95 FCC 2d at 557 n.6 (BOCs' intraLATA, interstate services not in the relevant market of domestic, interstate, interexchange telecommunications services).

dominant regulation when DTS is used to provide interstate exchange access services by an exchange telephone company or by an affiliated carrier in its exchange service area.[57]

24. There are two exceptions to forbearance treatment for all DEMS services. First, exchange telephone companies will be regulated as dominant for their domestic, interstate, interexchange DEMS services which are not provided through affiliated carriers.[58] We expect that exchange telephone companies will continue to be dominant providers of exchange and exchange access services, even with the entry of other DTS carriers. To qualify as a nondominant carrier for its domestic, interstate, interexchange DEMS services, a carrier affiliated with an exchange telephone company must meet the requirements of para. 9 *supra*. Also, AT&T has not filed any applications for DEMS or DTS. We currently apply dominant regulation to AT&T Communications' (ATCOM's) services, and we are uncertain how ATCOM will offer DEMS services or integrate DTS facilities into its other transmission facilities.[59] In light of our concerns about cost-shifting, anticompetitive conduct, and discrimination, we will apply dominant regulation to all of ATCOM's services until we evaluate further the record developed in the AT&T Inquiry and receive specific DEMS applications from AT&T.[60] On the other hand, if AT&T Information Systems provides DEMS services via resale, it can do so subject to forbearance.[61]

25. In their comments and replies, both SBS and Contemporary Digital Services urge that any forbearance be accompanied by preemption of any state regulation inconsistent with that policy. In our original DEMS order,[62] we did not preempt any state action at that time. But, we did express our intention to preempt any future state regulation which would interfere with our proposal for the development of end-to-end digital radio common carrier communications services. At the present time, we are not aware of any existing state actions which warrant preemption.

26. We also note that our decision to forbear from requiring Section 214 filings does not in any way relieve applicants from their obligations to

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[57] *Fourth Report*, 95 FCC 2d at 576.

[58] *See* Application of C & P Tel., *supra*, at 5-6 (use of DTS facilities for exchange or exchange access services by an exchange carrier in its own exchange service areas); para. 9 *supra*.

[59] *See* Reply Comments of MCI Telecommunications Corp. to ICOM Petition (MCI uses DTS facilities for its tariffed services just as it uses microwave, fiber, and other transmission facilities).

[60] Long-Run Regulation of AT&T's Domestic Interstate Services, *supra*; note 4 *supra*.

[61] AT&T: Provision of Basic Services Via Resale of Separate Subsidiary, *supra*.

[62] 86 FCC 2d at 389-90, *petition for review denied sub nom.* Alascom, Inc. v. FCC, 727 F.2d 1212 (D.C. Cir. 1984).

obtain a network authorization before proceeding to construct DTS facilities. In our reconsideration of the original DEMS order, we noted that applicants would not have to file separate Section 214 applications because the filing of information required to be submitted in a complete radio application for a DEMS network would be sufficient to make the necessary determinations under Section 214 as well as under Title III.[63] We want to emphasize that our decision today does not in any way affect the network concept of DEMS. Applicants must still seek and receive a network authorization under Title III before any construction may begin.[64] In addition, our decision in no way affects the maximum period for construction, which continues to be no more than 60 months after the grant of construction authority for Extended networks, and 30 months for Limited networks.[65]

IV. Conclusion and Ordering Clauses

27. We believe that the actions ordered today will eliminate unnecessary regulatory burdens, and improve the price and quality of services available to consumers by reducing regulatory costs and delays and promoting competition. We are continuing to examine the costs and benefits of other aspects of our regulation, including regulatory burdens imposed on AT&T, to further the statutory goals of widely-available, reasonably-priced, efficient telecommunications services.

28. IT IS ORDERED, pursuant to Section 4(i) and (j), 201-205, and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 201-205, and 214, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, That the policies set forth herein are adopted, that they are effective on the date of publication in the Federal Register,[66] and that Section 63.07 of the Commission's Rules, 47 C.F.R. § 63.07, is amended as set forth in the Attachment.

29. IT IS FURTHER ORDERED, That carriers treated by forbearance are given permission to cancel their tariffs on file with this Commission. Cancellation shall be by supplement effective upon five days' notice and the supplement shall reference this Order as authority for

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[63] 90 FCC 2d at 335, n. 24.

[64] *See* 47 C.F.R. § 21.15(i).

[65] 86 FCC 2d at 385-86; 47 C.F.R. § 21.43.

[66] The Commission finds that, because these policies relieve restrictions on competition and public benefits will be derived from putting them into effect without delay, an immediate effective date is in the public interest and has good cause. 5 U.S.C. § 553 (d), 47 C.F.R. § 1.427.

cancellation. For this purpose, Sections 61.56, 61.58, and 61.59 of the Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

ATTACHMENT

Part 63.07 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 63.07(a) is replaced by: "Any party that would be a non-dominant domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies."

2. Section 63.07(b) is replaced by: "Any non-dominant carrier that constructs or acquires (not by lease) initial or additional circuits shall report these circuits to the Commission semi-annually. These reports shall be filed on a consolidated basis on February 1 (covering facilities over which service was initiated during the preceding July 1 to December 31 period) and August 1 (covering facilities over which service was initiated during the preceding January 1 to June 30 period) of each year. These reports shall include:

(1) Caption — "Section 63.07 Report," including initial certification file number (if assigned);

(2) Name and address of carrier;

(3) Type, number and terminal points of circuits added; (in addition, if service is provided via satellite, the identity of the satellite(s) and a transponder-by-transponder loading); and

(4) Construction cost.

The Commission may request supplemental information."

3. Delete the remainder of Section 63.07.

Computing Device
Equipment Authorization Program
Radio Frequency Device, Authorization
Technical Standards

Proposal responds to a petition requesting exemption from technical and administrative requirements for computing devices sold in unit quantities of 300 or less per year, and for computing devices used in engineering and scientific development facilities.
—*Computing Devices*
Gen Docket No. 84-801

FCC 84-401

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of the exemptions in Subpart J of Part 15 of the Commission Rules for controlling the interference potential of computers and similar electronic equipment.	Gen Docket No. 84-801 RM-4246

NOTICE OF PROPOSED RULE MAKING

Adopted: August 13, 1984; Released: August 21, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. The Commission has before it a petition from Electronics Associates Inc., hereinafter EAI, seeking relief from the regulations in Part 15, Subpart J, which govern the interference potential of digital electronic computing devices, for two models of its computers: EAI model 1000 and EAI model 2000. The petition, designated RM-4246, was put on public notice and comments were received from Perkin Elmer Corporation supporting the EAI petition and from the Association of Maximum Service Telecasters generally opposing the EAI petition.

2. The EAI model 1000 is manufactured in Australia by a wholly owned subsidiary of the petitioner. It is sold in the USA in quantities of less than 10 units per year primarily to educational institutions. The EAI model 2000 is primarily located in large industrial complexes where it is used to make engineering evaluations of the equipment being produced by

simulating certain aspects of the product. This model was introduced in 1977 and is now nearing the end of its life cycle according to EAI, who estimates a total world-wide annual sale of about 10 - 20 units for the next few years. EAI reports that to date a total of 181 units have been sold worldwide, most going to U.S. Government installations and to foreign customers.[1] Only 46 units (25%) have been sold to nongovernment customers in the USA.

3. Both the models 1000 and 2000 are called hybrid computers, since they combine digital and analog processes. Both are subject to the Commission's Rules for computing devices in Part 15, Subpart J.[2] The computer rules were adopted in 1979 to control a rising incidence of interference from computers and similar electronic devices — both those used in the home and in business/industry. A final compliance date of October 1, 1983 was set which required that all computers manufactured thereafter comply with these rules. Five categories of equipment are specifically exempted from the technical requirements, which can be summarized as follows: equipment used in transportation vehicles; electronic control or power systems utilized by a public utility or in an industrial plant; test equipment; appliances; and, professional type medical equipment. Although exempt equipment is not subject to technical standards, in the event that the equipment causes harmful interference the operator is responsible to correct the interference, pursuant to 47 C.F.R. § 15.803.[3]

4. To relieve the regulatory burden on its equipment, EAI petitioned for two additional exemptions to those already in § 15.801(c). The first is for computing devices sold in unit quantities of 300 or less per year. The second is for computing devices used in engineering and scientific development facilities. Its request is based on the firm's two models described above, viz., EAI model 1000 and EAI model 2000. It argues that the computers are large and in many cases require subsystems supplied to EAI by others before the computer can be tested. As a result, the firms says it is extremely costly and in some cases actually impossible to test its computers on an open field test site. Nor is it practical to test such a

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[1] Computers sold to the U.S. Government or any of its agencies and computers manufactured for export are exempt from the FCC marketing regulations by statute, 47 U.S.C. 302(c). See 47 C.F.R. 2.807(d).

[2] Computing device is defined in § 15.4(m) of the Rules, which basically includes any electronic device, e.g. computer, that uses digital techniques. Computing devices have an electronic frequency generator, called a clock oscillator, to control the timing of events in the computer, that can and does radiate and cause harmful interference to radio communications, if not properly controlled.

[3] For a more complete explanation of the Computing Device Rules, see Bulletin OST-62, "Understanding FCC Rules for Computing Devices", which is available from the FCC Consumer Assistance Office.

hybrid system at the customer's premises, since the testing would have to be done in a high noise environment.[4] It also argued that since the computing device rules apply only to a portion of its equipment, the firm would be required to implement major design changes for that portion sold to non-government entities — a procedure which EAI considers economically unacceptable. EAI, unfortunately, did not submit information or data regarding costs, expected delays, etc. to support its contention. Nor, did it state why the number 300 was chosen. EAI presents no data relevant to the question of interference. The petitioner merely states in general terms that its computers are well buffered from other spectrum users, implying that because its computers are so located, interference will not arise.

Comments on EAI Petition

5. Perkin-Elmer Corp. joins EAI in its argument that it is not feasible to make the detailed measurements required for verification of computers built in small quantities, and stresses that this is an even more serious question when dealing with custom built or one-of-a-kind computing equipment. Perkin-Elmer also raises the question of how to treat older system which are reordered from time to time by its customers. Thus, Perkin-Elmer supports the EAI proposals, but leans more toward a less rigorous enforcement of the October 1, 1983 compliance date, urging the Commission to be lenient in granting waiver requests. The Association of Maximum Service Telecasters (MST) points out that EAI has not provided any information as to the total number of computing devices that would be exempt, their distribution, or their interference potential. MST contends that this lack of information makes it impossible to assess the public interest aspects of the proposed amendment. MST urges the Commission to defer action on the EAI petition until such information is made available and can be evaluated. No reply comments were received.[5]

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[4] Testing at the customer's site is permitted under 47 CFR 2.806, promulgated by the Commission by *Report and Order* in General Docket 81-463, adopted March 11, 1982, 46 FR 43709, April 1, 1982.

[5] On April 26, 1984, Cray, Inc. filed a separate petition for rulemaking to exempt specialized scientific computing devices. The petition, RM-4797, was put on public notice on May 14, 1984. The exemption requested by Cray is virtually identical to that requested by EAI. A similar request was also filed by Denelcor, Inc. on May 3, 1984 also seeking to exempt specialized scientific computing devices. The latter petition, RM-4816, was placed on public notice on June 29, 1984. Upon receipt of comments and replies on both of these new petitions, we will decide what action is appropriate. We have elected to move forward based on the EAI petition rather than delay this matter any further. However, it appears that the concerns voiced by Cray and Denelcor are addressed herein.

Discussion

6. Before addressing the merits of the subject pleading, we would like first to emphasize that we have in fact designed the computing device rules to be of minimal burden to manufacturers, both large and small alike. Most computer equipment, including the EAI equipment, is subject only to verification of compliance. Verification merely requires that the manufacturer perform measurements to determine compliance with the technical standards, place a label on the product, insert information in the instruction manual, and retain a copy of the verification records in the company's file. No submittal to the Commission is required. Only personal computer equipment is subject to FCC certification, a procedure which requires the manufacturer to submit a written application for Commission review and approval. Details on the verification and certification procedures are set forth in Part 2, Subpart J of the Rules. Verification, or certification, as the case may be, is a prerequisite to legal marketing of the equipment pursuant to the marketing rules in Part 2, Subpart I.

7. In addition, as mentioned above, we have temporarily exempted certain categories of equipment from these rules. The circumstances surrounding each exemption is not the same in each case; but, in general, our decision to exempt an equipment was guided by evidence indicating that the risk of interference was minimal and that the cost of compliance with a specific emanation requirement would be high. In the instant situation, while we agree with MST that the petition has presented very little information as to the interference risk associated with the requested exemption, it has triggered a general concern about how the computing device rules impact manufacturers of large speciality one-of-a-kind equipment. The Commission is particularly concerned about the impact the rules have on a small manufacturers of this equipment. For example, testing is a major concern for a small manufacturer, since, in most cases it must contract someone else to do the testing for it at the customer's site. On the other hand, before an additional exemption can be considered, the interference potential of such systems must be considered.

8. The interference potential of such equipment may be discussed from several viewpoints. First, if we assume that the exemption is properly worded so that it includes only large one-of-a-kind equipment or large specialized scientific equipment, the number of equipment could be assumed to be relatively small. Second, the location of this type of equipment is expected to be in industrial areas, universities or research laboratories, where the equipment is likely to be remote from communication and broadcast receivers. Two questions arise. How far will such equipment be from receivers? How many one-of-a-kind equipment may be involved? Unfortunately, we do not know the answers to these questions without data from industry. The Commission can only estimate that the

actual number and location of the equipment will be low and sufficiently remote. Assuming this to be the case, it may be more cost-effective and beneficial to the public to risk some interference from such equipment and to correct interference on an individual basis. Considering then the four above mentioned factors (location, number of units, risk, and the potential benefit), it may be advantageous to consider a proposal to add another exemption to § 15.801(c) for large specialized equipment.[6]

9. Considering the above discussion, we are proposing herein to add an exemption for large, essentially one-of-a-kind equipment or large multi-system equipment built in quantities of ten or less. We reject the suggestions made by EAI and Perkin Elmer to exempt equipment built in quantities of less than 300 and 50, respectively, since these numbers seem to be unreasonably high. To reduce the risk of interference, the exemption must be limited to a small number of essentially large one-of-a-kind type of equipment. Also, by keeping the number small, the potential for abuse of the exemption will be reduced. However, the number ten is not a magic number either and we seek comments to the question of: "What is an appropriate number of large special purpose equipment to exempt?" We also solicit comments to the question of "How can we best define the equipment to be exempted?" At the present time, it is not clear to us how this exemption can be written, so that the number of services is limited. We are concerned that unless an adequate definition can be written, abuse of the exemption or a flood of requests for interpretations may be the result. Neither situation would be acceptable. We solicit comments on how best to define the equipment under the exemption.[7]

10. An alternative to the exemption, which was mentioned by Perkin-Elmer, is to develop a streamlined procedure for granting waviers. Normally, a waiver takes three months to be acted upon. Perkin-Elmer is requesting that the procedure be streamlined so that waivers could routinely be acted upon by the staff. While such a procedure has some appeal, the same criteria for limiting such waiver requests could also be applied to an exemption. An appropriately defined exemption, if it can be written, would avoid burdening the Commission with handling a multitude

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[6] This proposal is not without risks. A certain number of one-of-a-kind equipment may in fact be located near a sensitive receiver system. Without proper safeguards, harmful interference may occur. Locating interference sources is also a difficult and burdensome task. However, the risks here seem minimal and without a detailed interference study, which is difficult if not impossible to obtain, we are inclined to put forth this proposal and solicit comments.

[7] For the purposes of this proposed exemption, computer systems which differ only insofar as identification, application, (e.g. analyzing one type of data vs. another), or the number and/or types of peripherals and other accessories, will be counted as the same system. Systems unexpectedly produced beyond 10 are not exempt and are subject to the pertinent requirements.

of individual requests. For these reasons, we are not inclined to favorably consider a streamlined waiver procedure at this time. Comments on this idea are solicited however.

11. We are also proposing to clarify the exemption in § 15.801(c)(3) for industrial, commercial, and medical test equipment. From the letters we have received inquiring about the computing device rules, there appears to be some confusion about the terms in front of test equipment.[8] The exemption was originally intended to cover equipment used to measure electrical parameters in the industrial, commercial and medical environment, such as oscilloscopes, counters, etc. At the time the exemption was proposed in 1976, it was believed that such equipment would be utilized by technicians who would be capable of correcting interference problems should they occur. It is now apparent that unskilled individuals are using test equipment in all environments, including in the home. We, therefore, solicit comments about whether the Commission should delete the exemption or merely limit the exemption to test equipment intended for use in scientific and university laboratories, as requested by Perkin-Elmer and EAI. We have proposed the latter, but invite comments on these questions.

12. The text of the proposed rules can be found in the appendix to this Notice. It is emphasized that we also seek answers to the questions raised herein.

13. Perkin-Elmer, in its comments, also requests that there should be some provisions for allowing older non-compliant systems that may be reordered by a customer. We are not inclined to go along with this request, since the Commission has allowed industry four years to bring such equipment into compliance and to permit the continuation of older equipment would extend the previous unsatisfactory situation. We do, however, invite comments on this suggestion by Perkin-Elmer.

Procedural Matters

14. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 601 *et seq.*, the Commission issues the following initial regulatory flexibility analysis:

I. Reason for action

This proceeding is in response to a petition for rulemaking requesting that certain equipment be made exempt from the FCC radio noise requirements for computing devices.

II. The objective

The Commission is proposing to exempt large equipment produced, imported, or marketed in quantities of 10 or less and equipment used in scientific laboratories

[8] To date the Commission has received approximately 1000 letters inquiring about various aspects of the computing device rules 47 C.F.R. Part 15, Subpart J.

from complying with the specific emanation limits and labeling requirements being imposed on most other computing devices. The objective is to reduce the burden of these rules on manufacturers where there appears to be little risk that the equipment will cause substantial interference.

III. Legal basis

The action proposed is in furtherance of Sections 4(i), 302(a), 303(g), and 303(r) of the Communications Act of 1934, as amended, which permit the Commission to make reasonable regulations governing the interference potential of radio frequency equipment and to promote the larger and more effective use of radio in the public interest.

IV. Entities affected; nature of economic impact; significant alternatives

The rules proposed in this Notice will relieve a regulatory burden for certain types of computer equipment, as noted in paragraph II above. This action is expected to have an economically beneficial effect on computer manufacturers, particularly small manufacturers. However, we currently do not know exactly how many small businesses will be included among these firms. No significant alternatives are apparent at this time.

V. Recording, record-keeping and other compliance requirements

This proposal seeks to remove record-keeping and other compliance requirements that presently apply to the subject computer equipment. The exempt equipment would be subject only to a general proscription against causing harmful interference.

15. For the purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time that a Public Notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final Order disposing of the matter is issued by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits an oral *ex parte* presentation, addressing matters not fully covered in any previously filed written comments for the proceeding, must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state the docket number of the proceeding to which it relates. See Section 1.1231 of the Commission's rules, 47 C.F.R. Section 1.1231.

16. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis of the expected impact of these proposed policies and rules on small entities. The initial analysis is set forth in paragraph 11. Written public comments are requested on the initial analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (P.L. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, *et seq.*).

17. Authority for issuance of this *Notice* is contained in Sections 4(i), 302, 303(g) and 303(r) of the Communications Act of 1984, as amended. In accordance with the applicable procedures set forth in Section 1.415 of the regulations, interested persons may file comments on or before October 5, 1984, and reply comments on or before October 22, 1984. All relevant and timely comments will be considered. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. A summary of these Commission procedures governing *ex parte* presentations in informal rule making is available from the Commission's Consumer Assistance Office, Washington, D.C. 20554.

18. In accordance with the provisions of Section 1.419 of the regulations, an original and five copies of all comments, reply comments, briefs, and other documents shall be furnished to the Commission. To obtain the widest possible response in this proceeding, informal comments (without extra copies) will be accepted, but these comments should make specific reference to this proceeding. Responses will be available for public inspection during regular working hours in the Commission's Public Reference Room located at its headquarters at 1919 M Street, N.W., Washington, D.C. 20554. For further information concerning this proceeding, contact Mr. Julius P. Knapp (202) 653-8247.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Section 15.801 of the FCC Rules, 47 CFR 15.801, is proposed to be amended by revising the present text of subparagraph (c)(3) and adding a new subparagraph (c)(6) to read as follows:

Section 15.801 *SCOPE OF THIS SUBPART*

* * * * *

(c) Pending the resolution of the proceeding in FCC Docket No. 20780 and related proceedings dealing with restricted radiation and computing devices, the following computing devices remain subject to Section 15.803 but are exempt from complying with other requirements of this subpart.

(1) * * *

(2) * * *

(3) Test equipment and equipment intended for exclusive use in scientific laboratories, including university laboratories.

(4) * * *

(5) * * *

(6) Large multi-system equipment produced, imported, or marketed in quantities of 10 or less per year. For purposes of this exemption, computer systems which differ only insofar as identification, application, or the number and/or types of peripherals and other accessories, will be counted as the same system. Systems unexpectedly produced beyond 10 are not exempt and are subject to the pertinent requirements.

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Common Carrier, Financial Reporting Requirements
Comsat, as common carrier

Second Notice of Proposed Rulemaking adopted on proposed modifications to and simplification of Comsat's Form M and Form 901 reporting requirements.
—*COMSAT*
CC Docket No. 80-634

FCC 84-392

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of	
Changes in the corporate structure and operations of the Communications Satellite Corporation	CC Docket No. 80-634

SECOND NOTICE OF PROPOSED RULEMAKING

Adopted: August 8, 1984; Released: August 14, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

I. Introduction

1. On April 20, 1984, we released a *Second Memorandum Opinion and Order* in this proceeding[1] (hereinafter *Second Comsat Structure* order), addressing the structure and operations of the Communications Satellite Corporation (Comsat). We concluded that Comsat's cost allocation system did not fairly allocate common costs, such as those associated with its Headquarters and Laboratory operations, between jurisdictional[2] and nonjurisdictional accounts. We therefore directed Comsat to revise its cost allocation system and file new tariffs (at its authorized rate of return) to reflect changed revenue requirements brought about by these revisions.

[1] Changes in the corporate structure and operations of the Communications Satellite Corporation, FCC 84-128 (released April 20, 1984).

[2] The term jurisdictional in this context refers to Comsat's INTELSAT and INMARSAT activities mandated by the Communications Satellite Act of 1962, as amended, and by the INTELSAT and INMARSAT Agreements.

2. In addition, we concluded that Comsat should modify its common carrier activity reporting system in order to better reflect its new cost allocation processes and its expansion of activity into nonjurisdictional areas. As a beginning to this process, we accepted Comsat's proposal[3] to file certain additional schedules to its Annual Report Form M and its Monthly Report Form 901. We also indicated that we would soon institute a proceeding devoted exclusively to Comsat's reporting requirements, with the expectation of revising and simplifying its filings. This Second Notice of Proposed Rulemaking (NPRM) is intended to implement this aspect of our *Second Comsat Structure* order.

II. Discussion

A. Current Report Requirements

3. Under the authority of Sections 219 and 220 of the Communications Act of 1934[4] and Sections 43.21 and 43.31 of the Commission's Rules and Regulations, Comsat currently files three series of Annual (Form M) and monthly (Form 901) reports.[5] The first, called "Comsat Unconsolidated", covers the parent legal entity which includes its World Systems Division and Headquarters operations. These operations include Comsat's jurisdictional INTELSAT and INMARSAT functions. The second, called "COMSAT General Unconsolidated", covers COMSAT General itself, but not COMSAT General's subsidiaries, such as Business Communications, Inc. and Telematics, Inc.[6] The final series is called "Comsat-Consolidated" and covers Comsat as a whole, including all of its divisions, subsidiaries,[7] and partnership investments.

4. Comsat has adapted Form M to its particular operations and files most of the schedules on this form, including general information, financial and accounting data, plant and operating data, pensions and

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[3] Supplemental Report on Allocation of Shared Services and Comsat Labs, CC Docket No. 80-634, submitted May 9, 1983.

[4] 47 U.S.C. Sections 219, 220 (1983).

[5] Form M is an annual report filed by carriers which, through a variety of schedules and forms, provides: (a) detailed financial and accounting on the carrier's operations; (b) plant and operating data; (c) pension, welfare and employment data; and (d) general corporate information relating to directors, officers and shareholders. This data is used by the Commission to fulfill its regulatory responsibilities under Titles II and III of the Communications Act of 1934, as amended. Form 901 is a monthly summary of revenues, expenses, assets and traffic.

[6] Business Communications, Inc. is a corporation set up by Comsat to invest in the SBS partnership. Telematics, Inc. is a corporation set up to invest in the INTELMET partnership.

[7] Comsat's wholly-owned subsidiaries include: COMSAT General Corp., Amplica, Inc., Telesystems, Inc., COMPACT Software, Inc., Environmental Research and Technology, Inc., and Satellite Television Corporation.

welfare data, and employment data.[8] Comsat has also adapted Form 901 to its activities. For Comsat-Unconsolidated (World Systems Division and Headquarters Division), Comsat files a Statement of Operations, a Statement of Financial Position, and selected detailed Traffic and Financial Data, including operating revenues and plant in service. For Comsat Consolidated, Comsat also files a Statement of Operations and certain Traffic and Financial Data. Finally, on the COMSAT General Form 901, Comsat files a Statement of Operations, a Statement of Financial Position, and certain Financial Data.

5. Focusing on those portions of the annual (Form M) and monthly (Form 901) reports covering the World Systems and Headquarters Divisions, Comsat does not currently provide separate data on the separate divisions and subdivisions within the parent legal entity.[9] Nor does Comsat provide data on how it allocates common costs, such as those associated with its Headquarters Division or the Laboratories subdivision, to jurisdictional accounts.

B. Proposed Reporting Requirements

6. *General.* As we concluded in the *Second Comsat Structure* order, the improper assignment of costs and expenses to jurisdictional accounts results in an inflated revenue requirement for Comsat and excessive rates

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[8] Comsat does not file the following schedules which it deems inapplicable: Schedule 2 (Control over Respondent); Schedule 12C (Analysis of Property Held for Future Use); Schedule 13A (Analysis of Plant Acquired); Schedule 13b (Analysis of Plant Acquisition Adjustments); Schedule 14B (Theoretical Depreciation Reserve Study); Schedule 15A (Analysis of Entries in Depreciation Reserve); Schedule 15B (Bases of Annual Amortization Charges); Schedule 16 (Miscellaneous Physical Property); Schedule 18 (Sinking Funds); Schedule 19 (Special Cash Deposits); Schedule 20 (Notes Receivable); Schedule 22 (Deferred Charges); Schedule 26 (Capital Stock and Funded Debt Reacquired or Retired During the Year); Schedule 27 (Matured Long Term Debt); Schedule 30 (Accumulated Deferred Income Taxes - Other); Schedule 39 (Special Expenses); Schedule 44 (Nondistortive Delayed Items); Schedule 51 (Statistics Relating to Central Offices); Schedule 52 (Telephones in Service); Schedule 53 (Telephone Calls); Schedule 54 (Telegraph Stations); Schedule 56 (Interstate Private Line Statistics); Schedule 57A (Overseas Telephone and Related Services); Schedule 58A (Stations Left in Place); and Schedule 58B (Station Apparatus in Stock).

[9] There are five subdivisions within the World Systems Division: (1) INTELSAT Communications Services (ICS), which acts as Signatory to INTELSAT and provides INTELSAT space segment and earth station common carrier services to authorized U.S. users; (2) Maritime Services (MS), which acts as Signatory to INMARSAT and provides INMARSAT common carrier services to U.S. users; (3) Comsat Laboratories, which supports ICS, MS, and other activities within and outside of Comsat; (4) Maintenance and Supply Center, which supports ICS, MS, and other activities within and outside of Comsat; and (5) INTELSAT Technical Services, which supplies services under contract to INTELSAT. These subdivisions perform both jurisdictional and nonjurisdictional functions. There are no subdivisions within the Headquarters Division, which also provides both jurisdictional and nonjurisdictional support within the company.

to INTELSAT and INMARSAT users. We also noted that improper cost allocations result in subsidies to Comsat activities outside of its jurisdictional operations. To address these concerns, Comsat's reporting systems should be designed to facilitate our monitoring of Comsat's jurisdictional common carrier activities, including the provision of INTELSAT and INMARSAT services. It should also enable us to ensure that Comsat's rates for these services are cost-based and that jurisdictional revenues do not improperly cross-subsidize other Comsat activities. Further, the reporting system should provide an accurate picture of the future corporation in order to assure that Comsat's nonjurisdictional activities do not adversely affect the overall financial viability of the corporation and thus increase the cost of capital assumed in jurisdictional revenue requirements. On the other hand, Comsat should not be required to expend funds on reports or schedules not useful to the above objectives. Such expenditures would not enhance our regulatory function and could place an unnecessary burden on Comsat. We shall examine in light of these considerations the three types of reports -Comsat Unconsolidated (Forms M and 901), COMSAT General (Forms M and 901) and Comsat Consolidated (Forms M and 901) - that are now being filed and offer tentative conclusions on changes to these reports.

7. *Comsat Unconsolidated Reports (Form M and Form 901).* Comsat, as a legal entity, files a separate Form M report that is not "consolidated" with its wholly-owned subsidiaries (e.g., COMSAT General Satellite Television Corporation, ERT, Telesystems, Amplica, etc.) This report primarily covers Comsat's jurisdictional INTELSAT and INMARSAT operations but also includes data on shared operations, such as Headquarters and the Laboratories, and on certain nonjurisdictional operations, such as its INTELSAT Technical Services line of business.[10] This Unconsolidated Form M report covers both jurisdictional and nonjurisdictional income and balance sheet data because we have permitted certain nonjurisdictional functions to be performed within the parent legal entity.

8. Although we recognize that it is necessary for accounting purposes for Comsat to submit balance sheet and income data on the entire legal entity, rather than only on its jurisdictional activities, we propose that Comsat report the percentage shares of balance sheet and income entries that it has allocated among the INTELSAT jurisdictional, the INMARSAT jurisdictional, and the nonjurisdictional accounts. In particular, all entries pertaining to shared activities, such as the Headquarters Divisions, the Laboratories, and the Maintenance and Supply Center, should have their jurisdictional and nonjurisdictional amounts separately detailed. The purpose of such modifications is twofold. First, they will allow the staff to

[10] Second Comsat Structure order, n. 38.

compute revenue requirements separately for each of Comsat's jurisdictional businesses - INTELSAT services and INMARSAT services.[11] Second, they will allow the staff to determine if Comsat is properly allocating common expense and common plant costs among its various jurisdictional and nonjurisdictional accounts. Therefore, we tentatively conclude that Comsat should modify all income and balance sheet schedules in its Unconsolidated Form M to separately state INTELSAT, INMARSAT, and nonjurisdictional entries.

9. Comsat's Unconsolidated Form 901 is intended to better reflect Comsat's jurisdictional accounts than its Unconsolidated Form M. The Form 901 presents the World Systems Division (and some Headquarters Division) net operating income, other income, and selected financial data of use in computing certain revenue requirements for the regulated jurisdictional business.[12] However, similarly to the Form M reports, we believe that the information reported is not of sufficient detail to allow for computation of INTELSAT and INMARSAT revenue requirements individually or to enable the staff to monitor Comsat's allocation of common expenses and capital costs to ascertain whether such allocation is in accordance with our orders. Therefore, we propose that Comsat submit on Form 901 separate income and financial schedules for its INTELSAT and INMARSAT operations. Comsat should also reconcile these schedules with total World Systems and Headquarters schedules (e.g., the Comsat legal entity) to show in detail what amounts of World Systems and Headquarters expenses and capital items were excluded from jurisdictional accounts pursuant to our orders in CC Docket 80-634. Such schedules should clearly show all data relevant to Comsat's revenue requirements for each of its jurisdictional activities. Included in such schedules would be the numerical basis for cost allocation as prescribed by the Commission - numbers of employees, cash expenses, assets, investment, and expenditures - for the divisions and subdivisions of the parent company and the relative percentages for the company as a whole. We tentatively conclude

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[11] Under Comsat's current format, balance sheet and income data for INTELSAT and INMARSAT operations are not separately reported.

[12] The financial data presented are: (1) INTELSAT Plant and Service; (2) INTELSAT Plant Held for Future Use; (3) INTELSAT Plant Under Construction; (4) Earth Station and M & S Plant in Service; (5) Laboratories and DED Plant in Service; (6) Headquarters Plant in Service; (7) Computer Plant in Service; (8) TTC&M Plant in Service; (9) Maritime Services Plant in Service; (10) AFUDC; (11) Depreciating Reserve; (12) Working Capital/ Materials and Supplies; (13) Plant Under Construction - Other than INTELSAT; (14) Plant Held for Future Use - Other than INTELSAT; (15) Current Assets; (16) Accrued Liabilities; (17) Escrow Deposits; (18) Capital Stock; (19) Retained Earnings; (20) Deferred Income Taxes; (21) Unamortized Investment Tax Credits; (22) R&D Expenses and Departmental Expenses for INMARSAT Services; and (23) Revenues, Departmental Expenses and Assets for services from Palau, Micronesia, Marshall Islands.

that submission of the revised schedules described above would be in the public interest.

10. *COMSAT General (Form M and Form 901)* COMSAT General Corporation, a wholly-owned subsidiary of Comsat, currently provides satellite-based systems and services for a broad range of communications needs. COMSAT General leases the capacity of its COMSTAR satellites to AT&T for domestic communications and furnishes capacity to the U.S. Navy and INMARSAT through the MARISAT system. COMSAT General also provides nationwide network television distribution, worldwide consulting, and international video services.

11. COMSAT General's Forms M and 901 are filed in a format similar to Comsat's other filings. We question whether this level of reporting is necessary for regulatory purposes. Comsat's leases of COMSTAR and MARISAT capacity are diminishing as these satellites reach the end of their useful lives and are not being replaced. In addition, we have streamlined the regulatory requirements for domestic satellite common carriers generally.[13] We tentatively conclude that there is no rationale for treating COMSAT General differently than other domestic satellite carriers, and that COMSAT General need not be required to file Form M and Form 901 reports on its domestic satellite operations. In view of our proposals to refine the treatment of jurisdictional reporting, we tentatively conclude that our overall objectives would be served by this approach. To the extent that COMSAT General or other Comsat subsidiaries or partnerships offer services other than domestic satellite operations, such entities would remain subject to the reporting requirements set forth in Part 43 of the Commission's Rules and Regulations and other applicable Commission decisions.

12. *Comsat Consolidated (Form M and Form 901).* Comsat's Consolidated Forms M and 901 contain income and balance sheet data for Comsat as a whole, including its wholly-owned subsidiaries. They also describe Comsat's investment in partnerships and joint ventures. These consolidated forms are required by Parts 43.21 and 43.31 of our Rules and Regulations.[14]

13. Since consolidated reports are the only reports that give the full picture of the health of the corporation and the relationship of jurisdictional activities to total activities, we tentatively conclude that Comsat should continue to file consolidated reports, although with certain possible

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[13] *See* Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefore (Fourth Report and Order), FCC 83-181 (released November 2, 1983).

[14] Many schedules provided on these forms are not supplied separately in the Consolidated reports because Comsat believes that the data are contained in the Comsat Unconsolidated and COMSAT General reports.

revisions. These revisions should serve the joint purposes of: (a) providing the Commission with sufficient data to assess the overall size and viability of the company; and (b) providing sufficient data on the number of personnel, and the assets, investments, expenditures, and expenses of the various subsidiaries and partnerships, by individual entity, to enable verification of our cost allocation formulas. It should be noted in this respect that under Section 201(c) of the communications Satellite Act of 1962 we have a statutory interest in the capital structure of the firm.

14. Addressing the first of these objectives, we tentatively conclude that the current format gives us sufficient data on the combined income or losses of Comsat, especially when viewed in conjunction with materials submitted under the Capitalization Plan orders.[15] As to the second objective, we observe that Comsat does not generally report data individually for its subsidiaries and partnerships in arriving at its consolidated schedules. Instead, as in Schedule 35 for example, only consolidated figures for data such as operations and maintenance and research and development expenses are shown. In order for us to be in a position to evaluate the proper application of cost allocation formulas, we tentatively conclude that Comsat should report all data pertaining to the allocation process (such as personnel, expenses, assets, investments, and expenditures data) individually for each subsidiary and partnership. Therefore, we tentatively conclude that Comsat should report this information in its current Consolidated reports, with revisions as indicated herein. If Comsat views this data on its subsidiaries and partnerships to be proprietary, we would consider treating it as such in a manner similar to that established for its Capitalization Plan submissions.

15. *All Comsat Reports.* We believe that Comsat, although it has a special statutory relationship with two international organizations, should not be burdened with filing requirements that do not serve the public interest. In this light, we request comment on whether other report or individual schedule within a report that Comsat now files provides an insufficient public interest benefit to justify the expense of its continued preparation and filing. We further request comment on whether other schedule that Comsat files can be simplified or revised to reduce Comsat's costs and to make more explicit or concise certain information necessary for regulatory purposes.

III. Ordering Clauses

16. Accordingly, in view of all the above, IT IS ORDERED, pursuant to Sections 1, 4, 201-205, 218, 219, 220, and 403 of the Communications Act

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[15] Consolidated Capitalization Plan for 1983-1985 of the Communications Satellite Corporation, FCC 83-273 (released June 13, 1983), *recon. granted in part,* FCC 83-381 (released August 17, 1983).

of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-05, 218, 219, 220, and and 403 (1983), and Titles 1 through 4 of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Sections 701-44 (1983), and Section 553 of the Administrative Procedure Act, 5 U.S.C. Section 553 (1983), that a rulemaking proceeding is HEREBY COMMENCED into the above-described matters.

17. IT IS FURTHER ORDERED, that, pursuant to applicable procedures set forth in Sections 1.410 and 1.415 of the Commission's Rules, interested parties may file comments on or before September 28, 1984 and reply comments on or before October 19, 1984. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. Participants must file an original and five copies of all comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, that for purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contracts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231.

19. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because these rule changes will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. Sections 603, 604, 605(b). This rulemaking affects only Comsat and its affiliates.

20. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this order to be published in the Federal Register and shall mail a copy of this NPRM to the Chief for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Mobile Radio
Developmental Authorization
Interference Due to Experimental Use
Modulation, ASSB (ACSBR)
Radiotelephone, Single Sideband

Applications for developmental authority granted in part to operate for hire two-way mobile radio stations using a modulation technique called amplitude compandored single sideband (ASSB), and employing frequencies interstitial to those already used by existing wireline common carriers. In light of the prohibition against interference to existing services caused by developmental systems, Commission stipulated that market testing could follow only after successful demonstration of electromagnetic compatibility with existing Public Land Mobile Service stations.
—*Contemporary Communications Corp.*

FCC 84-386

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Contemporary Communications Corporation	File No. 21850-CD-P-1-83 sequentially through
For Developmental Authorization for new two-way stations using Amplitude Compandored Single Sideband in the Public Land Mobile Service in the New York City area, the Los Angeles area, Texas, South Florida, and West Florida	File No. 21869-CD-P-3-83

MEMORANDUM OPINION AND ORDER

Adopted August 7, 1984; Released August 14, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ABSENT.

1. Contemporary Communications Corporation (Contemporary) has filed applications for developmental authority to operate two-way stations in the 152 MHz band employing a modulation technique called amplitude compandored single sideband (ASSB).[1] Contemporary seeks to operate five developmental systems for hire, utilizing 7000 mobile units and twenty-seven base stations in the New York City area, the Los Angeles area, the corridor between and including Dallas and Houston, South Florida, and West Florida. The stations would transmit at various frequencies in the 152 MHz band near the authorized band edges of channels used by existing wireline common carriers in the Public Land Mobile Service (PLMS).

2. On October 14, 1983, subsequent to the filing of its original applications, Contemporary filed an engineering amendment, proposing to limit substantially the initial scope of its developmental systems. It now proposes that testing be conducted prior to the authorization of full-scale developmental use. Based on these tests, only those ASSB stations shown to have an acceptable interference potential would be implemented. Alternatively, Contemporary proposes that acceptable stations in each of the five developmental systems could be placed in service on a system-by-system basis.

3. Petitions to deny the applications and their amendment were filed by American Telephone & Telegraph Company (AT&T), all of the wireline PLMS licensees located in the areas in which Contemporary applies to operate, several radio common carriers, and other land mobile interest groups.[2] Responsive pleadings have been filed.

4. We have reviewed the applications, the amendments, and related pleadings, and have concluded the public interest would best be served by approving a one-market developmental system implemented in two phases. Successful completion of phase one,essentially a demonstration of the electromagnetic compatibility of its system with existing PLMS stations, will serve as the condition which must be met before commencing phase two allowing restricted commercial operation. Before commenc-

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[1] ACSB, the more common acronym, is a registered tradename of Sideband Technology, Inc., one of the two manufacturers of ASSB radios.

[2] Petitions to deny, oppositions, and replies were filed by Contemporary; AT&T; New Jersey Bell Telephone Co.; New York Telephone Co.; Pacific Telephone & Telegraph Co.; Southern Bell Telephone Co.; Southern New England Telephone Co.; Southwestern Bell Telephone Co.; Conroe Telephone Co.; Continental Telecom, Inc.; General Telephone Co. of California; General Telephone Co. of Florida; General Telephone Co. of the Southwest; Page-A-Fone Corp.; Robert L. Mohr dba RadioCall Corp.; San Marcos Telephone Co.; Jim Bob Measures dba Radiofone, Danny Ray Boyer dba Mobilfone and Roger L. Dennis dba Dennis Mobilfone. We hereby grant their jointly filed Petition for Acceptance of Late-Filed Petition to Deny. NUR Corp. and the Special Industrial Radio Service Association each filed informal comments in opposition.

ing phase two, Contemporary must file a petition for rulemaking for the regular use of ASSB on frequencies that lie between those assignable for adjacent frequency modulated (FM) channels—a marked departure from the ASSB operations already permitted by Part 22.

ASSB and Contemporary's Proposal

5. ASSB combines standard single sideband modulation with forms of audio processing.[3] The signal quality of ASSB and its tolerance for interference are comparable to those of existing FM systems. Virtually all radios currently used in the PLMS employ an FM signal within a channel bandwidth of 30 kHz whereas an ASSB signal can be easily accommodated within a 5 kHz channel.[4] Because of ASSB's more efficient use of the spectrum, it holds great promise for alleviating the congestion in land mobile radio.[5] In recognition of this, the Commission adopted revisions to Part 22 of the Rules,[6] which include provision for the regular operation of ASSB systems, however, under restrictions that Contemporary's proposed ASSB operations could not meet.[7]

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[3] Single sideband is a form of amplitude modulation in which the carrier is suppressed and one of the two sidebands has been eliminated. Therefore, an SSB signal is effectively composed of the remaining sideband, which carries all of the transmitted intelligence (in this instance predominantly voice). Primarily, the audio processing for the ASSB signal involves compandoring—compressing the amplitude of the signal at the ASSB transmitter and recovering the original audio signal by expansion at the ASSB receiver, resulting in a signal-to-noise ratio comparable to that for FM.

[4] The maximum authorized bandwidth of emission of the FM signal at 150 MHz is 20 kHz. *See* §22.507(b). The emission of an FM signal extends outside of the 20 kHz bandwidth, however, with ever diminishing power. The signal must be attenuated as it extends outward from the center of the channel in accordance with §22.106. Beyond the edges of either side of the 20 kHz emission extending outside of the boundaries of the 30 kHz channel width, very low levels of FM signal power remain.

[5] The Commission has long been an advocate of ASSB and recently adopted two notices of proposed rulemaking for the regular authorization of ASSB in the Private Land Mobile Radio Service and for Broadcast remote pickup stations. *See* Narrowband Technologies for Base and Mobile Communications in the Private Land Mobile Radio Services, PR Docket No. 84-279, FCC 84-80 (released April 4, 1984), and More Efficient Use of the Available Spectrum for Broadcast Remote Pickup Stations, MM Docket No. 84-280, FCC 84-81 (released March 28, 1984).

[6] Revision of Part 22, Report and Order in CC Docket 80-57, 95 FCC 2d 769 (1983).

[7] Contemporary proposes that ASSB signals operate at frequencies 12.5 kHz above and below the center frequency of the channel occupied by an FM signal. The ASSB signals lying on either side of the FM center frequency would then be separated by 25 kHz and operated between the authorized emissions of adjacent FM channels, that is, interstitial to the authorized emission bandwidths of the channels (whose assigned frequency lies at the center of both the emission and the channel whose width is determined by the separation between adjacent assigned frequencies). Section 22.104(a)(2), which authorizes ASSB, does not permit this interstitial spacing, requiring that all center frequencies of ASSB, FM, or otherwise modulated signal, fall within the authorized emission bandwidth of 20 kHz.

6. Contemporary seeks to demonstrate that under existing rules the available spectrum can be utilized far more efficiently by allowing ASSB essentially to share the assignable channels with FM by using frequencies lying between (or interstitial to) the assigned center frequencies of adjacent channels.[8] Despite the close proximity of the two ASSB signals to the FM signal, all operating within the same 30 kHz PLMS channel, Contemporary claims that in practice interstitial ASSB would not cause harmful interference to FM operations. The basis for this claim is that the typical FM signal has its maximum energy concentrated near the assigned channel's center frequency and the level of that energy falls off to insignificance near the edges of the channel. Additionally, Contemporary claims, the ASSB radios it intends to employ, to be manufactured by the E.F. Johnson Company, will so constrain the bandwidth of the transmitted signal's emission that it further minimizes the interference potential to adjacent channels.[9]

7. In its amendment Contemporary proposes that its full-scale developmental system be implemented only after specific tests are conducted. Contemporary would conduct these tests in an effort to quantify and then minimize the interference potential to existing PLMS operations. Such testing would verify the achievement of certain "technical parameter milestones", whose variety and kind would be determined by the locations of the FM stations relative to those of the proposed interstitial ASSB operations. Contemporary indicates that each of several categories of those ASSB stations could commence operation based on their proposed locations and other determinants of their relative interference potentials.[10] Under one proposed alternative each category except one would be

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[8] See note 7, *supra.*

[9] The alleged superiority of the E.F. Johnson transmitter is manifested in the claimed significantly tighter frequency stability, superior spectrum shaping, dynamic management of output power levels, etc. The Office of Science & Technology's laboratory could not confirm the claimed superiority of these radios since it was unable to obtain a prototype radio from E.F. Johnson.

[10] Contemporary claims that of the four categories of channels it proposes, the "Area Separation" channels would not cause interference to FM. These channels were chosen according to the geographical separation of the ASSB from the FM base stations. That distance is predicated on a receiver selectivity in keeping with that for a typical FM receiver and on the frequency stability determined by the maximum swings of the undesired interferor ASSB and desired FM signals. Contemporary assumed in its original applications that typical FM receivers have a better selectivity. Just over half of the interstitial ASSB channels requested fall into the "Area Separation" category. Contemporary proposes three other categories of channels, also. "Co-location" channels, located within two miles of an FM station, would be activated when non-interference could be confirmed. "Coordination Test Required" channels would not be implemented until field testing could confirm non-interference. "Pager adjacent" channels are no longer proposed, but would again be proposed only when procedures are developed to ensure non-interference.

implemented after tests demonstrating a very low potential for interference. The one category of channels not requiring testing before implementation could be put into operation at once due to their geographic separation alone, resulting in a low potential for harmful interference to FM stations. The other alternative proposed by Contemporary calls for the implementation of the five systems one-by-one, after a full evaluation of test information gathered about all categories of channels for the previously authorized system(s). Contemporary suggests that because "maximum information" would be obtained, the Texas system, characterized by extensive urban, suburban, and rural coverage, should be authorized first. The parties filing oppositions to the amendment contend that many of these stations would still cause harmful interference due to alleged technical discrepancies and failure to consider the characteristics of particular FM systems.[11]

8. The parties filing petitions to deny challenge virtually every aspect of the proposal bearing on the system's potential for causing interference to existing FM operations. Among the issues raised is whether the equipment characteristics assumed by Contemporary for the FM environment were truly representative of that environment;[12] whether the power level designations for the ASSB signal could be related definitively and properly to that for an FM signal; whether transmitter frequency stability should be characterized in a non-traditional way for calculation of interference potential;[13] and whether the Carey Report, used for predicting co-channel interference potentials and thus the protection ratios in PLMS, can be utilized to determine adjacent channel interference.[14]

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[11] Oppositions to the amendment were filed by Southern Bell, Pacific Telephone, and Page-A-Fone. It was alleged variously that Contemporary 1) failed to consider that remote base receivers are used in Improved Mobile Telephone Service (IMTS); 2) did not conduct full tests to verify interference-free operation of the three types of ASSB interfering signals (base pilot, base intermodulation, and mobile pilot); and 3) did not consider that the microprocessor-controlled power management system in multi-channel base stations will be initially at full power and thus cause interference in the interval of time it takes for the microprocessor to activate for power reduction.

[12] The most critical are the selectivity of the typical FM two-way receiver and the poorer selectivity of the FM paging receiver.

[13] Prior to the filing of its amendment, Contemporary argued that frequency stability should be characterized statistically. As AT&T and others point out, however, the traditional method of considering the worst-case frequency swing is more appropriate since frequency drift does not exhibit short-term, rapid variations. All other things being equal, by using a statistical approach an inaccurate and unrealistically low potential for interference will be computed.

[14] Roger B. Carey, Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service, FCC Report No. 6406 (June 1964). The Carey Report provides the formula used for determining the protection ratio, or the ratio of the strength of the desired signal to that of the undesired or interfering signal. Petitioners refer to the undesired "adjacent channel" not as that occupied by an FM

9. Additionally, virtually all of the petitions to deny argue that what Contemporary initially proposed has all the earmarks of a commercial system—a large-scale network of stations providing service for hire to the general public in four of the largest markets for PLMS. The proposal is far larger in scope than the typical developmental application, the petitioners contend, and far beyond that contemplated by Part 22 for developmental systems. Existing PLMS licensees and would-be competitors in the same markets in which Contemporary proposes to conduct its developmental testing fear that should Contemporary expend the large capital resources initially proposed, the Commission would be extremely reluctant to terminate the otherwise temporary license authority. Furthermore, should the Commission authorize the rendition of interstitial ASSB services for hire, they fear that the Commission would be reluctant to destroy the subscribing public's expectation of and reliance upon a continuing service. Such disincentives to terminate the developmental authority, they insist, would result in a more ready approval of the once-temporary system as one of the first, if not the first, fully authorized commercial system. In any event, to the extent that commercial operation is necessary for the purpose of conducting market trials, petitioners argue that such testing does not involve a service concept that departs from that offered by existing two-way land mobile radio such that its marketability is required to be investigated. The chief inquiry—whether the proposed developmental system can operate on an interference-free basis, particularly with respect to existing FM PLMS licensees—should be resolved first. They contend that it would be premature to authorize large-scale tests, much less ones including commercial service.

Discussion

10. Approval and indeed encouragement of efforts directed toward the development of new radio technologies is a statutory obligation of this Commission, as expressed in Section 303(g) of the Communications Act of 1934, as amended, to "study new uses of radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest". Further statutory emphasis is provided by the new Section 7(a) of the Act, which states in part that "It shall be the policy of the United States to encourage the provision of new

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signal, but as the ASSB signal which would be only 12.5 kHz removed from the FM carrier. The interference potential results from the ASSB signal not being totally rejected by the FM receiver. In other words, the interstitial ASSB signal essentially occupies a portion of the 30 kHz of spectrum heretofore accommodating only one assignable FM frequency (lying at the center of that spectrum), and interferes with the signal detected by the FM receiver. Some other petitioners referred to the interstitial ASSB signal as a "co-channel" in recognition of its sharing the 30 kHz channel with the FM signal; others used the term "mid-channel."

technologies and services to the public."[15] Additionally, the section's legislative history takes cognizance of the often substantial commercial risks of developing new technologies like interstitial ASSB. We evaluated Contemporary's developmental applications in accord with the letter and spirit of our statute, keeping firmly in mind that developmental operation must not be allowed to disrupt the provision or the reception of existing radio services.

11. The FCC Laboratory conducted a study of ASSB compared with FM, in particular to determine whether interstitial ASSB systems could co-exist in the same geographical area operating on frequencies within the same assigned channel without causing interference to FM systems.[16] The study consisted of bench measurements and field testing. Although the test set-up was not identical to the system proposed by Contemporary the results generally substantiated the system results calculated by many of the petitioners, especially the Bell local telephone companies. The testing demonstrated that regardless of the capability of a given ASSB transmitter in constricting its output spectrum, the capability of the typical FM receiver to reject unwanted ASSB signals was of far more critical importance to whether interstitial ASSB would cause interference to existing FM systems. The typical FM receiver was shown to be less tolerant of interfering ASSB signals than Contemporary assumes in its initial applications.[17] The report therefore supports the objections voiced by the petitioners that the proposed interstitial ASSB developmental systems would cause harmful interference to existing FM PLMS operations. The report also concludes that the characteristics of ASSB and FM so differ that to implement them in the same spectrum would require certain engineering tradeoffs, which "vary on a radio service by radio service basis" and are "highly dependent on the interference levels that can be tolerated in a particular radio service . . ."[18] The Laboratory also evaluated Contemporary's Amendment, which claimed in reply to the oppositions that the sophisticated features incorporated into E.F. Johnson equipment could prevent harmful interference to FM from occurring. That evaluation expressed skepticism that the E.F. Johnson equipment

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[15] Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, 97 Stat 1467, 1471.

[16] Ralph Haller and Hank Van Deurson, Office of Science and Technology, FCC, Amplitude Compandored Sideband Compared to Conventional Frequency Modulation: Laboratory and Field Testing Results, FCC/OST 83-7, September 30, 1983; available as PB-116383 from the National Technical Information Service, Springfield, VA 22161.

[17] Contemporary assumed that the selectivity (the ability of the receiver to reject unwanted signals, in this case ASSB) is 60 dB. The Lab and the petitioners agree that the selectivity of the typical FM receiver is more like 35 dB, indicating a significantly reduced ability to reject unwanted signals.

[18] OST ACSB-FM: Lab and Field Tests at 91, *supra* note 15.

will solve the overriding problem of interference by ASSB signals to existing FM receivers. The Laboratory indicated its preference for allowing E.F. Johnson to demonstrate the capability of the equipment in a limited test so as to avoid interference to existing PLMS subscribers.

12. We have authorized developmental operations using ASSB of far more limited scope than Contemporary's proposal, but in areas where the potential for interference to nearby FM systems has been very low.[19] For PLMS, the tolerable levels of interference are characterized in rule Section 22.100(a) as "interference-free." This is contrasted with the less stringent standard for interference to private systems, whose frequencies are "available on a shared basis only" and are "not assigned for the exclusive use of any licensee". *See* Rule §90.173(a). Sharing frequencies or using them on a non-exclusive basis can result in occasional interference. While, like PLMS, private developmental systems may not cause interference to regular services, non-destructive interference that is nonetheless caused to existing private systems rarely would be perceived as harmful. Unlike subscribers to a PLMS system, users of private systems do not expect a quality of service approaching that of land-line telephones.

13. We agree with petitioners that the technical feasibility of using interstitial ASSB (in particular its compatibility with FM) should be tested, before service for hire should begin. Only after favorable test results from an initial test phase involving the proposed radio equipment, could Contemporary commence offering interstitial ASSB services for hire. We reiterate that at the outset the prime issue is the sharing of frequencies with existing FM stations, which sharing has the potential for causing interference. It would be unreasonable for Contemporary to begin an extensive for-hire program on a large-scale system whose potential for interference has not been determined.[20]

14. Contemporary claims that E.F. Johnson needs the incentive of manufacturing more than 7000 ASSB radios for the proposed system, and that both Contemporary and E.F. Johnson should be given an opportunity

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[19] The Mobile Services Division has authorized four developmental systems using ASSB on frequencies that are either adjacent to those already assigned or because of their locales do not pose a significant potential for causing harmful interference to nearby systems. The four systems are: Central Mobilfone in Dallas, File No. 24283-CD-P-6-83; Mid-Band Communications, Inc. in Philadelphia, File No. 24810-CD-P-2-83; Bee Mobilradio, Inc. in Kenedy, Texas, File No. 23286-CD-P-01-82; and Mobilfone Service, Inc. in Tulsa, File No. 20365-CD-02-82.

[20] For cellular radio, for example, developmental market testing in Chicago was conducted in two phases, system and equipment testing and market trials. Market tests limited to 2500 mobile radios and involving for-hire service to the public were authorized only after exhaustive technical testing had been completed employing up to 135 mobiles. Illinois Bell Telephone Co., 63 FCC 2d 655 (1977), *aff'd sub nom.* Rogers Radio Communications Services, Inc. v. FCC, 593 F. 2d 1225 (D.C. Cir. 1978); Telocator Network of America, et al., 70 FCC 2d 713 (1979).

to recover some of their capital expenditures. While we agree with the petitioners that the public should not be expected to pay the costs of Contemporary's and E.F. Johnson's experiment, there are other considerations favoring a limited market trial for interstitial ASSB.[21]

15. We desire that the developmental experiment yield not only some indicators of its electromagnetic compatibility with existing services, but some real world indicators of the public acceptability (or rejection) of interstitial ASSB service, *i.e.*, whether interstitial ASSB is feasible on a large scale in the marketplace. While apparently no service concept novelty is involved, as was the case for cellular radio during its developmental period, there are concerns as to the comparative service quality regarding signal range, fading, susceptibility to interference, and other factors determinative of radiotelephone voice quality. These factors likewise may affect the public acceptability of interstitial ASSB, alleged by Contemporary to be of a quality equivalent to or superior in some respects to FM. Limited commercial operation should suggest how it will fare in the marketplace by providing users with an additional choice of radiotelephone technology. Such information would be invaluable to the Commission and assist us in fashioning any rules that we may ultimately decide are necessary for regular public land mobile use of the frequencies interstitial to existing FM channels.

16. While Part 22 of the rules does provide for the rendition of developmental communication services for hire, Section 22.404(d) states that specific authorization by the Commission is required. In the past we have not routinely granted such authorizations. Mindful of the potential problems that commercial operation of a developmental system entails, we nevertheless believe that a limited market trial would serve the public interest because it would assist us in making the most enlightened and informed decision as to the potential of interstitial ASSB for use in a regular radio service. In addition, commercial authorization would be consistent with our decision in 1983 to broaden the scope of experimental testing allowed under Part 5, under which rule Part authority is typically given for the purpose of experimentally using frequencies not allocated for the proposed use.

17. In that decision, *Experimental Radio Services (Non-Broadcast)*, 54 RR 2d 1363 (1983), the Commission amended the rules to permit limited market trials involving the rendition of communications services for hire

[21] We note that since Contemporary first filed its applications and the subsequent amendment thereto, the Commission has provided for the regular commercial use of ASSB in the recently adopted Part 22 and proposed such use under Parts 74 and 90. *See* footnotes 5 and 6, *supra*. E.F. Johnson (and other manufacturers) therefore may also pursue the production and marketing of ASSB radios to be used in accordance with our present rules.

under experimental licenses authorized under Part 5. We expressed our belief that to provide more meaningful testing of nascent technologies, marketplace testing was of crucial importance in determining for a new technology what the sensitivity of demand for the new service might be for example to various price and quality levels. Not only could such information aid the Commission, it could be used by the licensee or the manufacturer of equipment to optimize or tailor the design of the equipment or the service or both. We specified a number of restrictions on for-hire service, however: experimental licensees (1) must retain ownership and control of any transmitting or receiving equipment that members of the public employ in the market trials and (2) must inform participating members of the public of the strictly temporary nature of the service for hire, which would be subject to immediate termination in the event the experimental use caused interference or the Commission deemed it otherwise necessary. These restrictions are necessary for developmental systems in general (and Contemporary's proposed system in particular) to minimize any public reliance on the continuation of the service. They would also tend to allay the fears of competitors concerning the disruption that may be caused to their own radio services, and serve to emphasize the temporary character of the experiment. We emphasize that should these experiments, particularly where the services are rendered on a commercial basis, prove successful and regular commercial service is authorized, the experimental licensee will achieve no undue competitive edge not merited by the timeliness and quality of any application to provide the new service.

18. We conclude that the public interest requires that some determination be made of interstitial ASSB's market potential after field testing demonstrates its interference potential. We therefore approve a developmental experiment consisting of two phases: Phase I will consist of field testing of equipment and system compatibility with existing radio systems, particularly 152 MHz FM stations; Phase II will consist of market trials (with for-hire authority) to commence only after whatever technical adjustments (e.g., base or mobile transmitter power reduction or use of lower gain or re-oriented antennas) would be necessary to preclude the system's causing interference to existing systems. In any event, should Contemporary's developmental system successfully demonstrate its ability to protect FM services from harmful interference, in addition to serving as a prerequisite for the rendering of commercial service, that success will be a prime factor, though not necessarily determinative, as to whether intestitial ASSB testing in any other markets will be permitted or whether it will be eventually authorized for regular use.

19. We anticipate that Contemporary will employ the E.F. Johnson equipment it has proposed to use, which should demonstrate how, under

conditions to be established at the conclusion of the first phase, larger scale testing could be authorized. Should we establish any such conditions, they will depend on the results of Contemporary's developmental effort including the statistical confidence that can be attached to them. In particular, we will consider whether there are any reports of interference directly attributable to the ASSB test set-up. In this regard, objectives of the test include: (1) whether ASSB mobiles can penetrate FM service areas without causing harmful interference and, if so, how far, and (2) the geographical distance that an ASSB base station can be removed from an FM base station and still be considered co-located with that FM station (so as to permit mutually interference-free operation).

20. In order to allow Contemporary to begin testing, but consistent with Section 22.104(c) of our rules proscribing interference to regular PLMS operations, we have selected those proposed channels in the Texas system whose use for interstitial ASSB should meet this criterion and not result in harmful interference to existing stations.[22] Analysis of our records leads us to categorize the proposed ASSB channels thus: unacceptably interfering, co-located (within 2 miles of an FM station), and "interference-free". Of the interference-free channels, we are authorizing at least two channels in each proposed city in Texas with the exception of Fort Worth (where we authorize 4 of 6 proposed channels), Houston (6 of 8 proposed) and San Antonio (4 of 6 proposed) for a total of 36 ASSB channels that should not cause interference to nearby PLMS FM stations because they are far enough removed in frequency or distance or both. Of the co-located channels, we select two channels in a major metropolis, Dallas, and two channels in a smaller city, Madisonville, all of which channels are not within the reliable service contours of any other FM stations operating within 12.5 kHz of the ASSB signals. Thus no interference should result. We do not select any of the channels we believe would cause unacceptable interference—a total of 12 ASSB channels in Austin and Houston. The authorization of these 40 channels reflects our primary concern of avoiding harmful interference to existing PLMS operations while at the same time providing Contemporary with ample opportunity to test the E.F. Johnson equipment and market interstitial ASSB services experimentally under varying conditions and demonstrate fully the equipment's claimed superiority in effecting the technical feasibility of the ASSB system proposal.

21. Based on the foregoing, we will grant Contemporary's applications for developmental authorization for 40 of the 70 frequencies requested for the Texas system including its request to provide services for hire over

[22] The incidence of harmful interference occurs on a probabilistic basis. It is thus more accurate to refer to the station's potential for interference as high or low rather than whether the station at a given point in time would in fact cause or not cause interference.

those frequencies. Whether or not we later authorize a larger developmental system or modify our rules to allow regular commercial ASSB operations on frequencies interstitial to adjacent FM channels will depend upon the resolution of the many issues raised in this proceeding in the context of a rulemaking proceeding.[23] Accordingly, we deny Contemporary's request for waiver of the requirement to file a rulemaking petition. The results of the developmental experiments and public comments in response to the petition and to any later rulemaking will be needed to determine the necessity for and nature of regulation of this proposed service. We note that Contemporary states that it is prepared to file such a petition, should the Commission request it. We make that request, and grant developmental authority to render interstitial ASSB services for hire on the condition that before commercial service is commenced, Contemporary must file a petition for rulemaking for the regular use of ASSB utilizing spectrum shared with that utilized by PLMS.

Ordering Clauses

22. Accordingly, IT IS ORDERED THAT the applications of Contemporary Communications Corporation ARE GRANTED IN PART for Dallas and Fort Worth, Texas, File No. 21851-CD-P-2-83 for the frequencies 152.4975, 152.5225, 152.7925, and 152.7675 MHz and 152.5575, 152.5825, 152.5875, and 152.6125 MHz, respectively; for Austin and San Marcos, Texas, File No. 21857-CD-P-2-83, for the frequencies 152.7075 and 152.7325 MHz, and 152.6475 and 152.6725 MHz, respectively; for Conroe, Texas, File No. 21858-CD-P-1-83, for frequencies 152.5275 and 152.5525 MHz; for La Grange, Texas, File No. 21859-CD-P-1-83, for frequencies 152.5275 and 152.5525 MHz; for Cat Springs, Texas, File No. 21860-CD-P-1-83, for frequencies 152.4975 and 152.5225 MHz; for Houston, Texas, File No. 21861-CD-P-1-83, for frequencies 152.5875, 152.6125, 152.6775, 152.7025, 152.7675, and 152.7925 MHz; for Gonzalez, Texas, File No. 21862-CD-P-1-83, for frequencies 152.5275 and 152.5525 MHz; for San Antonio, Texas, File No. 21863-CD-P-1-83, for frequencies 152.5575, 152.5825, 152.7675, and 152.7925 MHz; for Hillsboro, Texas, File No. 21864-CD-P-1-83, for frequencies 152.6475 and 152.6725 MHz; for Buffalo, Texas, File No. 21865-CD-P-1-83, for frequencies 152.5575 and 152.5825 MHz; for Moody, Texas, File No. 21866-CD-P-1-83, for frequencies 152.4975 and 152.5225 MHz; for Madisonville, Texas, File No. 21867-CD-P-1-83, for frequencies 152.6475 and 152.6725 MHz; for Corsicana, Texas,

[23] Rule §22.403(b) requires that developmental applications "shall be accompanied by a petition to amend the rules regarding frequency and other items necessary for the regular establishment of the proposed service." Although some issues are not addressed herein or not addressed fully, we believe it is more appropriate to do so in a rulemaking rather than in an adjudicatory proceeding such as this, limited to authorizing technical equipment and system tests, and limited market trials.

File No. 21868-CD-P-1-83 for frequencies 152.5275 and 152.5525 MHz. These grants are subject to the following conditions:

a) Contemporary shall commence developmental operation for equipment and system testing (Phase I) only after giving not less than 2 weeks written notice to all wireline PLMS licensees operating in geographical proximity to and operating within 12.5 kHz of the PLMS channels on which Contemporary's developmental stations operate. Notice shall also be provided to the Engineer-in-Charge, Dallas District Office, FCC. Each of these parties shall be afforded the opportunity to observe calibration and testing of the developmental system.

b) Contemporary may commence rendering developmental interstitial ASSB services for hire (Phase II) in accord with Section 22.404(d) on condition that:

(1) Phase I testing has demonstrated conclusively that no harmful interference was caused to existing services, in particular those FM radiotelephone services provided at 152 MHz.

(2) A petition to amend the rules has been filed to provide for the regular or commercial operation of ASSB on frequencies lying between the authorized F3 emission band widths of adjacent channels. Contemporary shall file this petition not less than 15 days beyond the date on which the evidence required in b)(1) above is available.

c) Contemporary also shall meet the following conditions before and during the conduct of Phase II testing:

(1) Inform each member of the public in writing who participates in Phase II testing that use of interstitial ASSB radio facilities is subject to immediate termination without advance notice, and caution the public against reliance on the continued availability of the equipment.

(2) All transmitting and receiving equipment (including antennas) involved in Phase II shall be owned by the licensee or manufacturer. Members of the public for purposes of Phase II may lease on a month-to-month basis or borrow such equipment.

(3) All responsibility for proper operation of all system facilities employed in the experiment, whether or not loaned or leased to members of the public, rests with Contemporary.

(4) Each piece of equipment used in market trials in Phase II testing shall be labeled regarding the equipment's status as to the information required in items (1), (2) and (3) above.

d) Monthly developmental reports shall be filed with the Commission with copies to be served on the Chief, Mobile Services Division, the Chief Scientist, the Dallas Engineer-in-Charge and the wireline PLMS licensees notified in subparagraph a), above. These reports shall specify the performance characteristics of the ASSB radio, particularly regarding interference caused to all nearby stations operating co-channel with and adjacent channel to the PLMS channels utilized for ASSB. Dates and particulars of all tests shall be fully described. They shall also specify, once for-hire service has begun, the number of customers that are utilizing the service, their reactions to the service including their likelihood of subscribing to the service if offered on a regular basis, comparison with available FM services, and other indications of prospective acceptance or rejection of interstitial ASSB.

e) This authorization is issued for a period of one year.

23. IT IS FURTHER ORDERED that the applications for the states of Connecticut, New York, New Jersey, Florida, and California, File Nos. 21850-CD-P-1-83, 21869-CD-P-3-83 and 21852-CD-P-1-83 sequentially through 21856-CD-P-3-83 are DENIED.

24. IT IS FURTHER ORDERED that except to the extent indicated, all petitions to deny the applications of Contemporary Communications Corporation are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Main Studio Location

Review of action denying application to move main studio of unbuilt TV station to the transmitter site denied. With the abolition of *de facto* reallocation policy, greater importance placed on maintenance of main studio within community of license, and locating a main studio 7 miles beyond a city 2½ times as populous as the community of license is inconsistent with FCC's licensing rules.
—*Holt-Robinson of Texas, Inc.*

FCC 84-452

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
Holt-Robinson of Texas, Inc. (KMLT-TV) Marshall, Texas	File No. BMPCT-830707KG
For a Minor Change in Facilities	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1984; Released: October 4, 1984

BY THE COMMISSION:

Introduction

1. The Commission has before it for consideration: (a) the above-captioned application of Holt-Robinson of Texas, Inc. (Holt-Robinson) to move the main studio of unbuilt station KMLT-TV, Channel 35, Marshall, Texas; (b) the March 13, 1984, action of the Chief, Mass Media Bureau, denying the application as a result of a petition for reconsideration filed by East Texas Television Network, Inc. (East Texas) (formerly KLMB-TV, Incorporated), permittee of stations KMLG-TV in Longview, Texas, and KLPH-TV in Paris, Texas; (c) Holt-Robinson's application for review of that action; and (d) related pleadings.

2. In its initial application for the channel, Holt-Robinson proposed to locate the main studio in Marshall, Texas and its transmitter approximately seven miles northwest of the city. That application was granted on December 3, 1981. On May 13, 1982, however, Holt-Robinson sought to move its transmitter 19 miles further west and seven miles on the other

side of Longview to a site 26 miles west of Marshall.[1] There was no opposition to Holt-Robinson's modification application, and it was granted on September 2, 1982. On July 7, 1983, Holt-Robinson sought to co-locate its main studio with its transmitter. Because Section 73.1125 of the Commission's Rules requires a broadcast station to locate its main studio within its community of license, Holt-Robinson submitted a showing to demonstrate good cause for locating its main studio outside of Marshall. The applicant contended that the proposed move toward the center of the Longview-Marshall Standard Metropolitan Statistical Area (SMSA) was necessitated by the recent grant of applications for three new commercial television stations that propose area-wide television service.[2] In further support of its request, Holt-Robinson argued that: (a) it will save nearly $60,000 in equipment costs, as well as construction and maintenance costs, by locating its main studio at its transmitter site; (b) co-location of the studio and personnel at the transmitter site will permit more prompt attention to transmitter problems; (c) it will maintain a sales office and either an auxiliary studio or a mobile van studio in Marshall; (d) driving time between the main studio and Marshall will be less than 30 minutes via good hard-surfaced highways and roads; and (e) a free shuttle service between Marshall and the main studio will be provided. There was no opposition to Holt-Robinson's application, and the Bureau granted it on July 29, 1983.

3. On August 18, 1983, East Texas filed a petition for reconsideration of that action. On March 13, 1984, the Bureau granted East Texas' petition citing the Commission's policy that the location of a station's main studio within the community of license is one of the factors in determining compliance with our licensing rules. *See Suburban Community Policy, Berwick Doctrine, and De Facto Reallocation Policy*, 93 F.C.C. 2d 436, 456 (1983), *recon. denied*, 56 RR 2d 835 (1984). Accordingly, the Bureau concluded that the relocation of Holt-Robinson's main studio to the far side of Longview, particularly in light of the fact that it had already moved its transmitter there, would subvert the Commission's allocations scheme.

4. The Bureau further noted that, although there are several aural facilities in Marshall, Channel 35 is the only commercial television allocation there. The Bureau, therefore, found the long-standing Commission policy with respect to the relocation of main studios to be controlling; i.e., absent a detailed showing of special circumstances, it is contrary to the public interest to authorize the relocation of the main studio of a community's only broadcast service to a location more proximate to a city

[1] Holt-Robinson estimates the distance to be "roughly 20 miles."

[2] Those stations include Station KCKU(TV), Tyler, Texas, authorized to Sunrise Broadcasting, Inc., as well as East Texas' new facilities in Longview and Paris, Texas.

of considerably greater size. *Harron Communications Corporation*, Mimeo No. 511 (MMB, released Oct. 31, 1983); *Champion Broadcasting System, Inc.*, 22 F.C.C. 2d 408 (1970); *South St. Paul Broadcasting Co.*, 43 F.C.C. 2d 600 (1973). The Bureau also found that the applicant had demonstrated neither the unavailability of a suitable site within Marshall nor any public interest reasons for moving outside of it. Specifically, the Bureau concluded that a main studio located some 30 minutes from Marshall was too distant for Holt-Robinson to serve its community of license adequately and that the offer of a free shuttle service between Marshall and its proposed main studio was not a viable alternative. The Bureau also rejected as an inadequate substitute for a main studio Holt-Robinson's proposal to locate a sales office and auxiliary studio in Marshall. Finally, the Bureau found the applicant's argument of more prompt attention to transmitter problems to be of little impact when compared to the larger issue of removal of the main studio of Marshall's only television station to the far side of Longview. Consequently, East Texas' petition for reconsideration was granted, the grant of Holt-Robinson's application was rescinded, and the application was denied.

Pleadings

5. On April 16, 1984, Holt-Robinson filed an application for review of the Bureau's action. In support of its application for review, Holt-Robinson first argues the inapplicability of the Commission's policy against the relocation of the main studio of a community's only broadcast service to a nearby central city of considerably greater size. The permittee first contends that it does not propose to locate its main studio in the larger city of Longview but, rather, in a rural area approximately seven miles beyond that city. Holt-Robinson further argues that, even if the studio were to be located in Longview, the disparity of population between the two communities is not nearly as great as that in previous cases espousing the policy.[3] Finally, Holt-Robinson contends that, in *Harron*, the licensee perceived a need to relocate to a larger city simply because it was the primary source of the region's governmental, cultural, and business activities, but that the Commission should not be concerned about any such abandonment here. Rather, Holt-Robinson contends that it has put forth engineering and economic reasons for the move. See paragraph two, *supra*. Although the permittee admits that its proposed studio would be as distant from Marshall as the proposed studio in *Harron* was from Poland Spring, it argues that the travel time involved

[3] Utilizing 1980 Census figures, the ratio of the population of Longview to that of Marshall is 2.5:1, whereas the ratios in *Harron Communications, supra* (Portland to Poland Spring, Maine); *Champion Broadcasting, supra* (Boston to Brookline, Massachusetts); and *South St. Paul Broadcasting, supra* (St. Paul to South St. Paul, Minnesota), were 17.6:1, 9.6:1, and 12.7:1, respectively.

should not trigger Commission concern, since it intends to provide an on-demand shuttle bus. Finally, Holt-Robinson reiterates its willingness to locate an auxiliary studio or mobile van in Marshall in addition to a sales office.

6. In opposition, East Texas points out that Holt-Robinson has not demonstrated the unavailability of suitable studio locations within its community of license. It also has not shown how the public interest would be affirmatively advanced by its proposed studio move or that public interest benefits outweigh the negative impact of removing its main studio from the community of license. With respect to Holt-Robinson's argument that consolidation of all the engineering staff at one location would facilitate faster transmitter repair, East Texas notes that not only are transmitter failures infrequent, but that many of them cannot be corrected solely through the presence of engineering personnel but, rather, require the replacement of parts. East Texas also minimizes the $60,000 cost savings estimated by Holt-Robinson, since that amount will be offset by the costs of operating an on-demand shuttle service and of maintaining a sales office and either an auxiliary studio or a mobile van studio in Marshall. Moreover, East Texas argues that any savings should be considered to be of benefit only to Holt-Robinson, since the applicant has not indicated how the savings would be used to provide improved facilities or service to the public. East Texas further argues that moving the main studio seven miles on the other side of Longview is at least as bad as locating it within that community, the result being that Marshall will be deprived of the main studio of its only television station. Finally, East Texas also takes issue with Holt-Robinson's minimization of the importance of the 26 miles distance between the proposed main studio and Marshall and argues that the proposed shuttle service would not eliminate the negative impact of the move.

Discussion

7. Section 307(b) of the Communications Act of 1934, as amended, requires the Commission to make a fair, efficient, and equitable distribution of radio facilities. In 1983, however, we were concerned that our *de facto* reallocation policy frustrated, rather than furthered, the purposes of that section, and the policy was, accordingly, abolished. *Suburban Community Policy, Berwick Doctrine, and De Facto Reallocation Policy, supra.* In doing so, we stated:

> In the future, we will examine applications to determine compliance with our licensing rules. If that exists, we will presume the licensee intends to serve the community designated. Compliance with the [licensing] rules will result in the requisite signal to the community of license, location of the main studio in that community and a programming proposal that will serve the needs of the community of license. Abolition of this policy does not mean that we will countenance subversion of our rules or the Tables. However, we believe the risk of renewal challenge for

> failure *actually* to serve the designated community constitutes a far more effective regulatory tool than utilization in advance of guidelines and factors that are inexact in divining intent. [93 F.C.C. 2d at 456, emphasis in original.]

We are not concerned here with signal intensity, because that element has been met. Further, the programming element is more appropriately considered at renewal time, when the licensee's track record is established.[4] Therefore, our attention at this point must focus on the location of the main studio in assuring compliance with the Television Table of Assignments and Section 307(b) of the Act. In that light, we have reviewed the action of the Bureau and agree that Holt-Robinson has failed to demonstrate that moving its main studio outside of Marshall would be in the public interest. The essence of our policy in this regard is that the ready accessibility of a main studio to a community of license is essential to assure service to the community of license and involvement in community affairs. *River Bend Broadcasting Co., Inc.*, 46 R.R. 2d 1709 (1980). To implement this policy, we have generally required an applicant proposing to locate the main studio outside its community of license to demonstrate either the unavailability of a suitable site within the community or special public interest reasons for moving outside of it. *Jackson County Broadcasting, Inc.*, 45 R.R. 2d 1723 (1979); *South St. Paul Broadcasting Co., supra.* The burden of justification is even higher in the case of the relocation of the main studio of a community's only television service to a nearby central city of considerably greater size. *Harron Communications Corporation, supra; Champion Broadcasting System, Inc., supra; South St. Paul Broadcasting Co., supra.* We agree with Holt-Robinson that those cases involved moving a main studio *into* a nearby larger city and that here the proposal is to locate the main studio approximately seven miles *beyond* Longview; however, we believe such a situation to be just as compelling. The telling factor is, after all, the accessibility of the station to the residents of the community of license, and locating the main studio on the far side of Longview only hinders its accessibility to residents of Marshall, while enhancing accessibility for Longview residents. In this regard, a shuttle bus is a totally unacceptable substitute for the convenience of locating the main studio in Marshall. Further, while we have permitted stations to co-locate their main studios at their transmitter sites, we have done so only in the presence of other public interest factors which are not present here. *Comcast Media, Inc.*, 38 R.R. 2d 359, 361 (1976). While Holt-Robinson states that it will save $60,000 as a result of the move, it has not demonstrated how those savings would inure to the public interest. Moreover, Holt-Robinson has

[4] In contrast, a permittee of an unbuilt station has only skeletal descriptions of its programming proposals on file. Such proposals will certainly evolve as experience and the marketplace dictate.

not even attempted to make the threshold showing as to the unavailability of suitable sites within Marshall. While Holt-Robinson appears to believe that it can obtain a suitable site for an auxiliary studio or mobile van, it has proffered no explanation of why such a site would be unsuitable for a main studio. We, therefore, agree with the Bureau's conclusions.

8. Accordingly, IT IS ORDERED, That the application for review filed by Holt-Robinson of Texas, Inc. IS DENIED.

9. Finally, the Chief, Mass Media Bureau shall send copies of this *Memorandum Opinion and Order* by Certified Mail-Return Receipt Requested to the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Instructional TV Fixed Service (ITFS)
Rule Making, Notice of Proposed

Further Notice of Proposed Rule Making adopted soliciting comments on the following: the nature and scope of permissible ITFS service; eligibility requirements, control of ITFS facility; procedural standards; procedures/criteria for mutually exclusive applicants; and interference protection standards.
—*Instructional TV Fixed Service*
MM Docket No. 83-523

FCC 84-363

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service	MM Docket No. 83-523

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 26, 1984; Released: August 10, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

Introduction

1. On May 26, 1983, the Commission adopted a *Notice of Proposed Rule Making* in MM Docket No. 83-523, 48 F.R. 29,553 (1983). The *Notice* proposed changes in certain Instructional Television Fixed Service (ITFS) requirements contained in Part 74 of the Commission's Rules. On the same day, the Commission adopted a *Report and Order* in General Docket No. 80-112, 94 FCC 2d 1203 (1983), which reallocated eight of the twenty-eight channels reserved for ITFS to the Multipoint Distribution Service (MDS) and permitted ITFS licensees to use their excess channel capacity for non-ITFS purposes, either by themselves or by leasing to other parties.

2. Both the *Notice*, whose proposed changes included relaxation of certain ITFS technical and nontechnical requirements, and the *Report and Order* were premised, in part, on the fact that the twenty-eight

channels allocated for ITFS were vastly underutilized. *See Notice, supra* at 29,554-55; *Report and Order, supra* at 1250. This was found to be the result of the specialized nature of ITFS and the limited funds available for its growth. *Id.* The growth and development of the educational and instructional services for which ITFS was designed were viewed as desirable goals and the Commission determined that permitting the leasing or commercial use of excess channel capacity and removing unnecessary and burdensome requirements would foster these goals. We continue to believe that both the goals and the means for their realization are meritorious and that the use of underutilized ITFS transmission time will foster a broader and more efficient use of spectrum capacity and will generate new revenue sources for the development of ITFS.

3. In another action today we are adopting a *Report and Order* in MM Docket 83-523 which relaxes ITFS transmission standards, authorizes "temporary fixed stations," authorizes program delivery to cable headends, encourages frequency coordination, authorizes a one-step licensing procedure and increases the ITFS license term from five years to ten years. Additionally, we note that since the adoption of the *Notice* in MM Docket 83-523 and the *Report and Order* in General Docket 80-112, there has been a significant increase in the number of applications filed for new ITFS facilities.[1] This interest in the ITFS spectrum is clearly a result of our decision to permit the use of ITFS excess channel capacity for commercial purposes in that most of the applications propose, under varying circumstances, to lease channel time to MDS operators. While increased usage of the ITFS spectrum is desirable and encouraged, we believe that further consideration of certain aspects of the use of channel capacity for non-ITFS purposes, and other matters relating to ITFS generally, is necessary to assure the preservation of the ITFS service. This will foster the goals sought to be achieved by such usage; namely, the growth and development of ITFS. Existing ITFS rules and policies are not adequate or inclusive enough to deal realistically with the rapidly changing developments in this area.

4. Therefore, we are issuing the instant *Further Notice* and soliciting comments on matters dealing with the following: the nature and scope of permissible ITFS service; eligibility requirements for becoming an ITFS licensee; control of an ITFS facility by a licensee that leases excess channel capacity to others; procedural standards for "cutting off" applications that are accepted for filing; selection procedures and criteria for choosing among mutually exclusive applicants; and interference

[1] In FY 1984, it is anticipated that over 700 applications will be filed, as compared to a total of 170 applications filed in FY 1983.

protection standards.[2]

Permissible ITFS Service

5. When the Commission decided to permit ITFS licensees to use their excess channel capacity for non-ITFS purposes, it still required licensees to utilize "each of their . . . main channels substantially for legitimate ITFS use." We stated that we expected "traditional uses" to continue and that "any wholesale abandonment of the primary purpose of the facility could jeopardize the entity's license." *Report and Order* in General Docket 80-112, *supra*, at 1251, 1252-53.

6. The purpose and permissible uses of ITFS were originally established in 1963[3] and are embodied in Section 74.931 of the Commission's Rules. The service was intended to be used for the transmission of programming to "accredited schools" for the "formal education of students."[4] Specifically, Section 74.931(a) provides:

> Instructional television fixed stations are intended *primarily* to provide a means for the transmission of instructional and cultural material . . . to *specified receiving locations* for the *primary purpose* of providing a *formal educational* and cultural development to *students enrolled* in *accredited* public and private *schools, colleges and universities.* [Emphasis added].

On a secondary basis, ITFS stations are permitted to transmit special training material to selected receiving locations outside school systems such as hospitals, nursing homes, training centers, and commercial and industrial establishments for the extension of professional training. ITFS service is also permitted to professional groups or individuals for the purpose of informing them of new developments and technical activities in their fields and for other related services directly concerned with formal or informal instruction and training. Section 74.931(b). When stations are not being used for these purposes, licensees are authorized to use the facilities for administrative activities (*e.g.*, holding of conferences with personnel, distribution of reports, exchange of data or statistics). Section 74.931(c). Stations may also be licensed as relay stations, under certain circumstances, to interconnect ITFS systems. Section 74.931(d).

7. Over the years, as the educational needs of our society have changed and the demand for educational and instructional services has increased, certain ITFS systems have emphasized programming directed to inservice training and professional career development. More recently, it appears that some applicants perceive an increasing need to include

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[2] A number of letters and other comments have been informally submitted to the Commission which deal, in some respects, with certain of these matters. These documents will be associated with the docket and the parties are invited to file further comments directly addressing the matters discussed herein.

[3] *Report and Order* in Docket No. 14744, 39 FCC 846 (1963).

[4] *Id.* at 852-3.

homes and offices, as well as industry sites, laboratories and military bases, as receive locations for the dissemination of public service information and continuing and adult education courses. Some ITFS systems request additional channels solely for these purposes and some new applicants, who propose leasing channel time for MDS use, also appear to emphasize this aspect of their ITFS service proposals.

8. We believe that the need and demand for the dissemination of programming of an educational, instructional, cultural and informational nature, for other than classroom purposes, will continue to expand into offices, industry, hospitals, training and cultural centers and the individual home, and that this is not only inevitable, but desirable. While educational institutions which are the traditional ITFS licensees may be an appropriate source for certain of these materials, ITFS is by no means the only delivery system that is, and can be, utilized for such purposes. Programming of this nature is available, and can be made available where the demand exists, through commercial and educational broadcast stations, cable television systems, videotext and teletext services, video cassettes, satellite services and eventually multichannel MDS. ITFS, in many instances, is a proper and important adjunct to these other sources and while its entry into new markets is not to be discouraged, we presently believe that the foundation of the service must continue to be that for which it was designed—the transmission of educational materials to accredited schools for the formal education of students enrolled there. This kind of programming is not traditionally provided by other outlets and the specialized and unique audience served is one whose very important needs could too readily be ignored if ITFS stations were permitted to transmit their programming to any location of their choosing or any location equipped to receive the programming. This is especially true where ITFS licensees are leasing excess channel time for MDS-type uses. In our assignment of frequencies, we have distinguished between ITFS and MDS, to which we have allocated different channels. If we fail to define and enforce permissible use requirements, we risk the loss of the ITFS service to subscription entertainment delivery systems and the failure to meet the important specialized needs the ITFS service is designed to serve.

9. We believe all ITFS applicants, whether leasing excess system time or not, must transmit educational programming to accredited schools specified as receive locations in their applications, for the formal education of enrolled students. However, rather than treating such service as the "primary purpose" of ITFS systems, which connotes a majority of the system's time, we believe it may be sufficient to treat such program service as an "essential use" of the ITFS system. We, therefore, solicit comments on whether it may be appropriate to amend the rules to

provide that as long as some system time is devoted to educational programming for students enrolled in accredited schools, that the remainder of time used for ITFS purposes, even if that be a majority of the time, can be devoted to programming other than in-school instructional programs. This seems especially appropriate where the applicant is a local educational institution which is devoting time to what it has determined is the extent of its own in-school needs. We also seek comments on the following matters. Should the same standard apply to other local entities (*e.g.*, noncommercial organizations that are the licensees of educational broadcast television stations and are now seeking ITFS licenses) that are proposing to serve needs of schools not directly associated with them? Is it necessary to quantify "essential use" for any applicant by prescribing a minimum amount of time that must be devoted to programming directed at schools?[5] Should such use be determined on a per-channel or per-system basis? Should adult or continuing education programming received outside the school (*e.g.*, in the home), but for credit toward an academic degree, be considered toward meeting an "essential use" standard and would an applicant be capable of demonstrating the public receptiveness to, and extent of, such service at the construction permit application stage?

10. A related matter specifically concerns the ITFS applicant that is proposing to use excess channel capacity for non-ITFS purposes. In order to qualify for such usage, the ITFS licensee is required to use a "significant portion" of its system for traditional ITFS uses. See Section 74.931(e) of the Rules. Due to the uncertainty which had arisen because of the ambiguity associated with the "significant portion" requirement, we established an interim standard, pending the outcome of the instant rulemaking proceeding, in our reconsideration of the *Report and Order* in Docket 80-112.[6] This was necessary to prevent a *de facto* reallocation of the ITFS channels for other uses and to discourage entities not primarily interested in providing traditional ITFS services from filing proposals which could change the nature of the service.[7] The standard we established provided that:

> No ITFS licensee may lease or use for non-ITFS purposes capacity on any channel unless that channel is being used for ITFS purposes for a minimum of 15 hours per week during the period between 8:00 a.m. and 10:00 p.m. each day, Monday through Friday, excluding holidays and vacations.

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[5] We believe minimum requirements are essential for entities proposing to lease excess channel time, or otherwise use their channels for non-ITFS purposes. See ¶¶ 10-13, *infra*.

[6] *Memorandum Opinion and Order*, FCC 84-177, adopted April 26, 1984, released June 5, 1984.

[7] *Id.*

We further stated that if an ITFS licensee uses each of its main channels for traditional programming only, then each channel would be considered as being used substantially for ITFS purposes regardless of the number of hours a licensee operates each day, each week, or each year. We continue to believe that this distinction is appropriately made between the ITFS applicant that is proposing to lease or otherwise use channel capacity for non-ITFS purposes and the ITFS applicant that is proposing to use its facilities *only* for traditional ITFS purposes, including the transmission of educational and instructional programming to schools. This is to assure than an applicant that is proposing to contract away a considerable segment of its channel capacity for non-ITFS use will, in fact, present at least a minimum amount of ITFS programming to the audience designed to be served by the traditional ITFS services.

11. In our reconsideration *Order, supra,* we concluded that 15 hours of weekly transmission time between 8:00 a.m. and 10:00 p.m. of ITFS programming constitutes a minimal usage of an ITFS channel, based on the recognition that primary and secondary schools are generally in session during the day for approximately six hours of instruction, or an average of 30 hours per school week. We found that any licensee that was leasing excess capacity and was transmitting ITFS programming for less than half that time would not be using a "significant portion" of that channel's capacity for ITFS purposes. In adopting this standard, we indicated that we had never collected data on how many hours per day (or per week or per year) ITFS stations generally operated prior to our decision to allow non-ITFS usage. We also recognized that existing ITFS use may vary considerably from system to system and that generalizations may be difficult to make. To the extent that such data may be available, we solicit its submission for our consideration and solicit comments on whether such data can practically be used for establishing a minimum operating standard.

12. Whether the interim standard strikes a proper balance between utilizing idle spectrum capacity more efficiently and assuring the preservation and development of the ITFS service is a matter on which comments are also invited. The standard, as noted, was intended to set a *minimum* only and was not an attempt to define what we expect to see as a typical ITFS operation. We believe that some minimum standard is necessary when non-ITFS usage is involved and propose to retain a 15-hour minimum unless comments suggest that a higher standard is more appropriate. We also invite comments on whether the minimum amount of ITFS programming should be on a per-day basis (*e.g.*, each channel must be utilized at least three hours per day, Monday through Friday, between 8:00 a.m. and 10:00 p.m.) rather than on a per-week basis. One concern with a per-week standard is that ITFS programming could be "loaded" in

one or two days per week and the remaining channel capacity leased out for non-ITFS purposes; *e.g.*, 24 hours per day, five days per week. Comments are solicited on whether to adopt the interim standard as a final rule or to modify the rule by setting a higher minimum, a per-day, per-channel usage requirement, or both.

13. Section 74.931(e) of the rules, as amended in the reconsideration *Order, supra*, establishes that the transmission of programming which is intended both for the education of students in schools (74.931(a)) and for such things as in-training service and professional career development (74.931(b)) is acceptable for meeting the minimum standard. However, as previously stated, we consider it essential that all ITFS systems provide some amount of programming to accredited schools, which are specified as receive locations, for the formal education of enrolled students (74.931(a)). If an applicant is proposing to use its facilities for non-ITFS purposes and is proposing at least the 15-hour minimum amount of ITFS programming, or more, should we require that a specific amount of that time be devoted to programming for the education of students enrolled in accredited schools? Comments are invited on this matter.

Eligibility Requirements

14. To be eligible for an ITFS license, a party must be a school, a governmental organization engaged in the formal education of students (*e.g.*, a school board or district), or a nonprofit educational organization.[8] In the case of nonprofit educational organizations, the Commission considers eligibility by taking into account whether the organization has any state, regional or national accreditation.[9] While accreditation can be a determining eligibility factor, we believe that unaccredited organizations should also be permitted to demonstrate their educational nature and the validity of the ITFS service proposed. Some nonprofit organizations, not accredited by any recognized accrediting agency are ITFS licensees that for years have been providing and producing educational, instructional and training programming to schools, hospitals and social service agencies. We believe that entities with this kind of experience, or organizations which are clearly involved in education or have a history of educational

[8] Section 74.932(a) of the Rules provides: "A license for an instructional television station will be issued only to an institutional or governmental organization engaged in the formal education of enrolled students or to a non-profit organization formed for the purpose of providing instructional television material to such institutional or governmental organizations.... A nonprofit organization which would be eligible for a license for a noncommercial educational television broadcast station is considered to be eligible for a license for an [ITFS] station."

[9] Sections 74.932(a)(1) and (2) of the Rules provides: "In determining the eligibility of ... educational organizations, the accreditation of the appropriate state department of education or the recognized regional and national accrediting organizations will be taken into consideration."

service of a nature other than ITFS, should not be precluded from being licensed or seeking additional licenses. *See Public Broadcasting Service (PBS)*, FCC 83-611, adopted December 30, 1983; released January 9, 1984.

15. Since our decision to permit the leasing of excess channel capacity for commercial purposes, we have seen a significant increase in the number of applications filed by nonprofit organizations seeking to establish ITFS stations. Most of these applicants are either backed by MDS operators and have agreements to lease channel capacity to them or intend to lease capacity on any facilities which may be authorized. Although we are not now questioning the validity of the educational nature of certain of these organizations, we believe that more formal screening criteria should be established to continue to assure that nonprofit organizations which are issued ITFS licenses are bona fide educational entities. We have already suggested factors which can be considered; *e.g.*, accreditation, educational background and experience, history of educational service. In addition, comments are invited on what documentation might be appropriate to establish the educational nature of the applicant.

16. One specific source of concern in this area is that most nonprofit organizations which have applied for ITFS licenses have no local presence in the communities where facilities are sought. Backed by MDS operators who desire to establish multichannel MDS systems through the leasing of ITFS capacity, many of these applicants have filed numerous applications for many major markets. Many are mutually exclusive with each other or with local or regional educational institutions or organizations which, in some cases, also have lease agreements with MDS entities. Many of the applications, as originally filed, were not tailored to the community applied for; the proposed programming for all communities was often vague and virtually identical; few proposed to provide equipment for local program production; many did not have the consent of the local schools specified as receive sites for the proposed ITFS service. In fairness to the applicants, we recognize that they were attempting to file proposals as quickly as possible to avoid the "land rush" of applications which has developed and that they had little guidance as to what would constitute acceptable proposals. It is the purpose of this rulemaking to establish such guidelines.

17. The ITFS rules do not prohibit nonlocal applicants. The Commission simply did not contemplate national ITFS networks and the changes in technology which have made such networks feasible, when the rules were adopted some twenty years ago. In recent years, certain state educational television commissions have shown an interest in the ITFS service. The South Carolina Educational Television Commission is an example of a state entity that has been granted permits to establish ITFS

systems in communities throughout South Carolina as a means of furthering the educational needs of the state. Last year, we authorized the Public Broadcasting Service (PBS) to establish a national network of ITFS stations in communities where local member stations have noncommercial educational television broadcast stations. *See PBS, supra.* We believe that under proper circumstances, state, regional or national networks can provide many benefits to communities through the exchange of programming among all stations in the system and through the economies resulting from cost-sharing.

18. Thus, while the importance of localism and knowledge of the educational needs of a community cannot be underestimated, we do not believe that a qualified educational organization should automatically be precluded from becoming an ITFS licensee solely on the basis that the organization is not physically located in the community where the facility is sought. Nonlocal service can complement local educational outlets and serve unserved local needs, especially in those communities where channels remain vacant and no local educational entity is applying for their use. Because ITFS frequencies were allocated in the first instance for in-school educational purposes, which are generally under local control, we invite comments on whether nonlocal applicants, who have otherwise established the bona fide educational nature of their organization and propose an ITFS service consistent with the other standards to be established in this proceeding, should still demonstrate a local involvement in the educational communities in which they seek construction permits. We also invite comments on whether in the comparative context it would be appropriate to grant a preference to local over nonlocal applicants. *See* paragraph 35, *supra.* We note, in this connection, that the staff of the Mass Media Bureau has requested by letters of March 20, 1984, from certain nonlocal applicants who also propose to lease excess channel capacity, a showing of reasonable assurance that the specified local educational institutions and other entities that they propose to serve are supportive of their applications and intend to utilize the proposed service in their educational curricula and developmental programs. Applicants were requested to submit letters from each specified receive location. The letters were not required to contain a binding commitment, but were expected to demonstrate something more than a mere expression of general interest in the proposed service. Among other things, these applicants were also requested to describe the nature and extent of involvement by local educational, cultural and civic groups in the selection and/or production of ITFS programming.

19. We seek comments as to whether such showings by nonlocal applicants should be required by rule and incorporated into the ITFS

construction permit application form (FCC Form 330-P).[10] We also invite comments on the extent to which nonlocal applicants should involve local entities in the selection of educational programming. Should a nonlocal licensee establish a local program selection and development committee or can other methods be established to assure that the local educational needs of the educational institutions served will continue to be met on an ongoing basis? We prefer to afford applicants the flexibility to establish procedures for ongoing local involvement which they believe are suitable, based on individual circumstances, and to demonstrate the suitability of these procedures to us. Finally, we invite comments on whether requirements established for local involvement, including requirements of reasonable assurance that local institutions intend to use the proposed service, should also be applicable to local entities that are not serving their own local in-school needs.

Licensee control

20. Another matter which arises as a result of our decision to permit the leasing or other non-ITFS use of excess channel capacity is the issue of the extent of control a licensee should be required to exercise over its facilities when those facilities are being shared by others. The issue becomes more complicated when the party sharing the facilities is the entity responsible, as a result of the financial arrangements between the parties, for the very existence of the ITFS station.

21. In the *Report and Order* in General Docket 80-112, *supra*, at 1252, we noted that existing ITFS facilities did not readily lend themselves to widespread MDS use, in that they were tailored to the unique requirements of the particular licensee. Many systems serve a limited number of receive locations with highly directionalized antenna patterns. We also pointed out that a licensee would most likely consider its own growth requirements and limit the availability of excess channel capacity so that it could retain channel use for its own needs as they arise. We thus concluded that existing licensees would carefully select lessees for long-term contracts and tailor the contractual arrangements to their individual needs.

22. We did not consider the fact, however, that a relatively small number of new entities, backed by MDS operators, would seek to establish "national networks" of ITFS stations, that certain of the applicants would be financially dependent on the MDS entity and that lease arrangements would be entered into for "excess channel capacity" prior to the time the ITFS applicant was even aware of what the instructional and educational needs were of the local institutions it was

[10] Form 330-P will be revised when a *Report and Order* is issued to track the standards and requirements which are ultimately adopted in this proceeding.

proposing to serve. Many of the proposals appeared tailored as much to the requirements of MDS as to ITFS. All proposed community-wide coverage with omnidirectional antennas and in markets throughout the country where multichannel MDS has the possibility of competing successfully with other delivery systems. Lease agreements provide, in many instances, that the MDS lessee will finance, construct, own, maintain and operate the physical plant and will lease a large proportion of channel time, with the ITFS licensee itself leasing back the physical facilities, at only a nominal rate, for the ITFS time it reserves by contract for itself. The right to lease ITFS excess channel capacity, and our reasons for permitting this practice, however, present unique questions of "control" as it relates to the ITFS service, which have not been addressed by prior case law. We allowed leasing, in part, as a revenue source for the funding of ITFS operations, recognizing that the lack of resources was an underlying reason for the widespread underutilization of the allocated spectrum. We believe the entry of new applicants into this service can result in an increase in the ITFS programming presently available and that many ITFS stations would not be built without the financial support and backing of MDS operators.

23. In exchange for this backing, MDS operators may require certain necessary and appropriate contractual terms which may appear to infringe on ITFS licensee control. For example, an MDS operator may need access to a specified amount of airtime, during specified periods of the day, for leasing to be worthwhile. The MDS interest must also have some measure of financial control, since it is agreeing to contribute much of the funding. Also, allowing the MDS lessee control over the design and construction of the system may be in the best interests of the parties and the public because of the greater technical expertise which MDS operators generally have. We invite comments on what measure of control and what rights and responsibilities should generally be retained by the ITFS licensee to assure that ITFS channels are used to meet present and changing educational and instructional needs. How should the responsibilities pertaining to programming, construction and operations be divided between the sharing entities? Specifically, we seek comments as to the licensee's ability to recapture air time or otherwise have time available to meet changing ITFS needs as they arise. With respect to the construction, operation, maintenance and ownership of the station's facilities, our preference would be to impose as few restrictions as possible, affording the parties the flexibility to negotiate these matters on their own.

Processing Procedures

24. New processing procedures are required because of the significant increase in ITFS applications following the issuance of our leasing decision and the fact that present ITFS rules and policies do not allow for

an orderly, efficient and equitable processing of these applications. Specifically, ITFS rules do not provide for the traditional cut-off or "window" filing periods. As a result, applications remain subject to petitions to deny and mutually exclusive proposals until the day they are acted upon. Because the demand for channels exceeds the supply in a number of major markets, many mutually exclusive situations exist which cannot be resolved without the establishment of a selection procedure.

25. Even though we now find it necessary to establish procedures for resolving mutually exclusive situations, it is important to emphasize that parties are still encouraged to resolve such disputes privately. The instructional programming carried by ITFS provides a necessary public service and should reach students and other intended audiences as soon as possible. Realizing that there will be a period of time before a decision is issued in this proceeding, which adopts permanent rules for resolving mutually exclusive proposals, we intend to expedite the processing of applications whenever the parties, by private agreement, can eliminate the mutual exclusivity. To foster a stable atmosphere for negotiating settlements, we are implementing a cut-off procedure immediately for applications already on file. *See* paragraph 30, *infra*. We encourage parties to attempt to achieve resolutions through frequency coordination, time-sharing, reductions in the number of channels requested or other acceptable methods.

Cut-Off Procedures

26. As noted, there are no cut-off periods or other restrictions on the filing of petitions to deny or the filing of applications which are mutually exclusive with a previously filed application. No procedural rules have specifically been developed for ITFS because there was no pressing need for cut-off and selection procedures until recently. It is axiomatic that the longer an application remains subject to competing applications, the greater the likelihood that a mutually exclusive situation will develop. Furthermore, the Mass Media Bureau's staff has experienced situations where its resources have been expended in processing applications only to discover the filing of mutually exclusive proposals at the last minute. Most services have cut-off rules or "window" filing periods to avoid such problems and to allow for a more efficient processing procedure. While in the past the use of traditional cut-off dates has been the principal means of limiting filings which may affect pending applications, the "window" or "date certain" cut-off approach has recently been employed on an increasing basis. *See Second Report and Order* (Private Land Mobile) in Docket PR 79-191, 90 FCC 2d 1281 (1982); *Memorandum Opinion and Order on Reconsideration* (Cellular Radio), 89 FCC 2d 58 (1982); *Report and Order* (MDS) in General Docket 80-112, *supra*; and *Notice of*

Proposed Rulemaking (Low Power Television Service) in MM Docket No. 83-1350, Mimeo No. 34076, released December 23, 1983.

27. It is well established that cut-off dates may be used as a means of restricting the period during which petitions and mutually exclusive applications may be filed. *See Kessler v. FCC*, 326 F.2d 673 (1963). The traditional cut-off rules[11] utilize an "A" or initial cut-off list which is in the form of a Public Notice that contains identifying information on an application or applications accepted for filing and sets a date by which mutually exclusive applications and petitions must be filed. Later, a "B" list is issued containing all applications filed by the cut-off date which are mutually exclusive with the application(s) on the "A" list and setting a date for the filing of petitions against the later filed applications. At the end of the "B" cut-off period, a universe of applications and petitions can be determined and a stable environment exists in which to complete the processing of the applications.

28. "Window" or "date certain" cut-offs specify a date or period for the filing of applications. All applications filed during this period are considered together and any mutually exclusive proposals are segregated from the others and the processing of both the single applications and the mutually exclusive proposals can proceed efficiently since they are no longer vulnerable to new applications being filed.

29. In considering whether the "A" and "B" cut-off procedure or the "window" approach would be more appropriate for ITFS, we will be mindful that a longer time may be required for educational institutions and nonprofit educational organizations to obtain local authorization to file for facilities and to obtain the necessary funding. We intend to establish finite periods for filing new applications, but wish to implement the procedure which best suits the needs of such entities. Comments are invited on the appropriateness of these or other cut-off procedures.

30. With respect to applications currently pending, the vast majority have been on file for well over four months and they all have been on Public Notice as being accepted. Many have been subject to petitions to deny and many are mutually exclusive with each other, as well. We believe it inappropriate to permit these applications to remain vulnerable to petitions and other proposals for an unlimited period of time. Accordingly, parties will be given 30 days from the publication of this document in the Federal Register to file petitions to deny or mutually exclusive applications against any ITFS application that was accepted for filing on or before the publication date. This will allow us to facilitate the processing of applications that have been on file for long periods of time and will permit the grant of any pending applications that are not

[11] Section 73.3571(c) for AM, 73.3573(d) for FM and 73.3572(c) for television broadcast services.

mutually exclusive. This procedure will also permit negotiations among mutually exclusive applicants that might resolve the conflicts, thus leading to an earlier inauguration of new ITFS service. Such negotiations might otherwise prove fruitless if competing applications could be filed at any time. Applications filed after the publication of this *Further Notice* will be processed under the present standards, until such time as final rules are adopted in this proceeding. The processing of all mutually exclusive applications will be deferred until the adoption of procedures for making choices among conflicting proposals.

31. The existing ITFS rules do not define "major" changes in authorized or proposed facilities and we do not intend to amend the rules in this regard. However, we propose to continue our present practice of treating applications for construction permits for new channels, or for the addition of channels to existing facilities, or similar amendments to pending applications, as being subject to a thirty-day "holding" period before action will taken. *See* Section 309 of the Communications Act of 1934, as amended.[12]

Selection Procedure for Mutually Exclusive Applications

32. As mentioned earlier, there are at present no established criteria for resolving mutually exclusive cases. Although we strongly encourage private resolution of conflicts, we do not anticipate that all of the estimated 200 mutually exclusive applications on file can be settled through private resolution. Therefore, we must establish procedures for resolving mutually exclusive situations.

33. Amendments were solicited in the *Notice* in Mass Media Docket 83-523 on certain selection procedures for deciding among mutually exclusive applicants; *i.e.*, lotteries, "first-come-first-served," or other methods.[13] That *Notice*, however, was issued and the comments were received prior to the submission of the vast majority of pending applications. Commenters did not have an opportunity to assess the impact which the new applications, filed after our decision to permit leasing and non-ITFS use, might have on the traditional ITFS service.

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[12] We also propose to continue our present practices in the following matters. Applications for changes in facilities which do not involve new or additional channel requests, licenses to cover construction permits and applications for extension of time to construct can be acted upon at any time after their acceptance for filing. Assignment and transfer of control applications, which are not subject to competing applications (*See* Section 310(d) of the Act) will be held for thirty days after acceptance for filing (except for *pro forma* changes) to afford parties an opportunity to file petitions to deny under Section 309 of the Act. License renewal applications should be filed four months before the expiration of the license term and will not be acted upon any sooner than 30 days prior to the expiration date.

[13] Comments received in response to the earlier *Notice* relating to selection procedures will be associated with the additional comments filed in this proceeding.

Notwithstanding the changed circumstances, we believe that the comments filed in response to the first *Notice*, objecting to full hearings and "first-come-first-served" procedures, were well founded and still apply. Given the nature of the service, full hearings are wasteful of our resources and those of the applicants. The "first-come-first-served" method would appear to disfavor local educational entities, such as school boards, which may not be able to prepare and file applications as quickly as commercially backed applicants. Therefore, we propose to eliminate both methods from consideration as possible selection procedures.

34. That leaves for consideration several alternative methods for making selections. These include: (1) a lottery with preferences accorded for specified factors; (2) a paper hearing in which specified factors are given merits or demerits, including "enhancements," in much the same way as factors are weighed in full comparative hearings; (3) a mechanical point system, in which the specified factors are reduced to points, so that the applicant with the highest total will be the winner; or (4) a combination of the preceding methods, such as a point system, with a drawing to be used in the case of applicants with identical or very close total points. Those proposing the use of lotteries may wish to address the appropriateness of following the lottery statute, Section 309(i) of the Act, for the ITFS service. *See Random Selection Lotteries*, 93 FCC 2d 952 (1983).

35. In each of the selection procedures that we are considering, it will be necessary to determine which, if any, criteria should be afforded a greater weight or a preference. We believe that any criterion proposed should be designed to promote the objectives for which ITFS stations are primarily authorized. At this point, three criteria appear most important: (1) the amount of programming proposed for in-school use; (2) the amount of other traditional ITFS programming as provided for in Section 74.931(b), *e.g.*, adult and professional education; and (3) the nature of applicants; i.e., applicants with an established presence in the community, as opposed to nonlocal applicants. Comments are solicited on the selection procedures, these criteria, any other criteria that would promote ITFS goals and aid in the selection process, and the weight to be accorded to each. Commenters should, of course, relate any criteria proposed to their preferred method of selection. Comments are also invited as to the means by which petitions to deny will be considered under the selection procedure proposed.

Miscellaneous

36. In the *Report and Order* adopted today in this docket, we are retaining Section 74.902(c) of the Rules which precludes assignment of more than four channels to the same licensee for use within the same area. This rule also provides that where an applicant applies for more than one channel, "the Commission will determine whether or not a grant of

the channels requested would serve the public interest." In the past, when spectrum capacity was abundant, the Commission routinely granted four-channel requests and, in many instances, also granted waiver requests for more than four channels. Since our decision to permit leasing, the demand for channels has significantly increased, especially in the major markets. We believe it may now be necessary to impose a specific standard for granting multiple channels. We are concerned that applicants whose proposals realistically require only one or two channels may be requesting four or more, whether to reserve scarce capacity for future educational needs or to accommodate the interests of MDS lessees. Accordingly, we invite comments on the factors to be considered in assessing the sufficiency of the showing submitted by an applicant requesting more than one channel.

37. Furthermore, we note that those nonlocal applicants proposing national service have requested a substantial number of channels throughout the country. If all their applications were granted, a scarcity of spectrum capacity could result with the effect that channels may not be available in many markets for other deserving or future applicants, including local educational entities, or for existing licensees seeking to expand. We, therefore, invite comments on whether only one channel should be made available in any particular community for use by nonlocal applicants.

38. *Interim Processing Standards.* We intend to continue the processing of applications that are not mutually exclusive during the pendency of this proceeding. However, because of the uncertainties that have developed since our decision to permit the leasing of excess channel capacity and because of the vagueness of many proposals now on file, we believe it is necessary to clarify, through the adoption of the following interim processing standards, certain of our existing policies, rules and application form requirements which will be applied in determining the appropriateness of granting particular proposals. All applications granted will be subject to a condition that the applicant comply with any policies and rules that may be ultimately established in this proceeding. Action on mutually exclusive proposals will be deferred pending the conclusion of this proceeding and the adoption of selection procedures. Accordingly, applicants for new facilities will be required to include information with respect to the following:

1. Applicants must specify accredited public or private schools, colleges or universities which provide formal education to enrolled students as receive sites. For each channel requested, a showing must be submitted as to the number of hours of programming to be devoted to the transmission of educational and instructional programming to students enrolled at such receive sites.

2. Applicants proposing to lease or otherwise use excess channel capacity for non-ITFS purposes must comply with Section 73.931(e) of the Rules, with respect to the 15-hour minimum per channel, per week of traditional ITFS programming.

3. A showing must be submitted as to compliance with the eligibility requirements of Section 74.932(a) of the Rules. Non-profit educational organizations that otherwise establish their qualifications will not be precluded from being licensed *solely* on the basis that they may be a nonlocal entity.

4. All applicants that are not educational institutions or school districts proposing to serve their own in-school needs must submit a showing of reasonable assurance that the specified educational institutions and other entities which are proposed to be served are supportive of the application and intend to utilize the service in their educational curricula and/or developmental programs. This showing should take the form of a letter from each receiving location specified in the application. It should be signed by an individual authorized to sign for this purpose on behalf of the specified entity. The Commission is not requiring the submission of a binding commitment from such entities, but something more than a mere expression of interest should be demonstrated.

5. A copy of any document, instrument, contract or summary of any understanding relating to ownership, use or control of the station or its facilities, as required by Section II, question 11 of Form 330-P, must be submitted.

6. A proposed weekly schedule of programs must be submitted, as required by Section IV, question 2 of Form 330-P, for each channel requested. On the basis of the proposed weekly schedule of programs, a showing, in narrative form, of the need for the number of channels requested to meet the traditional ITFS programming proposals.

Technical Standards

39. In a companion docket to General Docket 80-112, we released a *First Report and Order* amending the Rules with regard to technical requirements applicable to the MDS[14] and a *Further Notice of Proposed Rulemaking and Notice of Inquiry*[15] addressing other MDS technical issues.

40. Current ITFS rules depend on informal coordination between operators to anticipate and resolve electrical interference problems encountered when stations are operated in the same geographical area. It was noted in the *Technical Standards Order* that as more MDS stations became operational, informal coordination procedures became less successful and that formal procedures and interference criteria were required.[16] In view of the proposals for the increased ITFS/MDS use of the 2500-2690 MHz band, we propose to adopt ITFS technical standards similar to those for MDS, including a "service protection concept." We will

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[14] *First Report and Order*, General Docket 80-113, FCC 84-175, adopted April 26, 1984, released June 14, 1984. (hereinafter *Technical Standards Order*).

[15] *Further Notice of Proposed Rulemaking and Notice of Inquiry*, General Docket 80-113, FCC 84-176, adopted April 26, 1984, released June 14, 1984. (hereinafter *Technical Standards FNPRM*).

[16] *Technical Standards Order*, ¶¶ 6 and 7.

also address ITFS matters which, because of the nature of the service, require different standards. This action is intended to establish uniform coordination procedures for both services, promote a more efficient utilization of the spectrum and benefit both the Commission, in processing applications, and applicants, in designing systems.

41. The proposed standards include the following:

1. Cochannel protection ratio of 45 dB.
2. Adjacent channel protection ratio of 0 dB.
3. Standard antenna parameters for interference analysis (i.e. a two foot parabolic reflector antenna).
4. A nominal 710 square mile service area dependent upon, and conforming to, the transmitting antenna pattern where interference from other stations will not exceed the cochannel and adjacent channel protection ratios.
5. Cochannel and adjacent channel protection for existing ITFS receive sites (which have been authorized by having been specified in applications filed with, and granted by, the Commission) and which are located outside the above mentioned service area; provided, however, that the power flux density of the transmitted signal is above the specified minimum usable level proposed herein.

In addition, we propose that each ITFS application include a potential interference analysis of cochannel stations within a 50 mile radius of its transmitter site. Moreover, we encourage applicants applying for first adjacent channel facilities to colocate or be within 01.5 miles of other adjacent channel facilities.

42. Since the proposed ITFS technical standards have already been addressed in great detail by the *Technical Standards Order* and *Technical Standards FNPRM*, *supra*, we shall only briefly describe the identical changes as they apply to ITFS. A comprehensive discussion of the issues, is contained in the above referenced *Order* and *FNPRM* docket file.

43. *Cochannel Interference.* The MDS rules specify a 45 dB cochannel protection ratio (i.e. the difference between the desired signal and the undesired signal must be 45 dB at the receiver antenna terminals) for stations operating in the same geographical area.[17] The 45 dB ratio was established on the basis of tests conducted by the Television Allocation Study Organization (TASO), in which actual television pictures, both with and without cochannel interference, were compared by a panel of views.[18] We propose to adopt the same 45 dB protection ratio for ITFS. Accordingly, comments are requested on the cochannel protection ratio.

44. *Adjacent Channel Interference.* In addition, the MDS rules specify a 0 dB adjacent channel protection ratio (i.e. the undesired channel signal must not be stronger than the desired signal at the receiver

[17] See the discussion in *Technical Standards Order*, ¶¶9-23.

[18] *Id.* at ¶11.

antenna terminals) for stations operating in the same area.[19] This ratio was based on tests conducted at the Commission's laboratory in Maryland.[20] In these tests, actual television pictures, both with and without adjacent channel interference, were compared by a panel of viewers. We propose to adopt the same 0 dB adjacent channel protection ratio for colocated ITFS stations. Comments are requested on this standard and on appropriate adjacent channel protection ratios for adjacent channel facilities which are not colocated.

45. *The Standard Antenna.* In order to determine by calculation whether an undesired signal will cause harmful interference, a two foot parabolic reflector antenna was chosen as a reference.[21] We stress, as we did in the *Technical Standards Order*, that we are not requiring that antennas with such characteristics be used, but rather that these characteristics are to be used in making interference and other calculations. Comments are requested on the standard antenna.

46. *Protected Service Concept.* The *Technical Standards Order* addressed two possible operational configurations that may appear in an ITFS transmission system.[22] The ITFS transmitting antenna would be either omnidirectional or wide beamwidth directional (i.e., single cardioidal pattern) at local receivers. In either case, the definitions of the protected service area in the *Technical Standards Order* would be applied to ITFS as the minimum protected service area, i.e., an area where receive sites should not experience interference. Applications need not be filed to add such receive sites after an initial authorization and such sites would receive "protection" even though not necessarily listed in the Commission's files. However, applications must continue to be filed to construct or add all ITFS "response" stations, even in the protected area.

47. For a station using an omnidirectional antenna, we propose that the boundary of the protected service area should be 15 miles from the transmitting site. For a station using a directional antenna, we propose that the boundary of the protected service area be determined by the following equation:

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[19] *Id.* at ¶¶24-36.

[20] FCC, *A study of the Characteristics of Typical Television Receivers Relative to the UHF Taboos*, Project Number 2229-3 (June 1974).

[21] See *Technical Standards Order*, ¶¶ 37-48.

[22] *Id.* at ¶¶ 49-136.

$$D_b = \frac{D_{bmax}}{\text{antilog}\left(\frac{G_{max} - G}{20}\right)}$$

in which the parameters are defined as follows:

D_b = the distance to the boundary in direction of interest;

G = the transmitter antenna gain in the direction of interest;

G_{max} = The maximum antenna gain;

D_{bmax} = the distance to boundary, in the direction of maximum gain that will make the total area of the protected service area equal to or less than 710 square miles.

All distances are in miles; the gains are in dB relative to an isotropic antenna; and the antilog is taken to the base 10.

48. An ITFS station may have long path links to receivers or relay stations located outside the protected area. This is practical using high gain directional antennas and/or elevated antenna heights. These stations located outside the proposed protected area could be licensed and afforded the same degree of protection if the transmitted signal produces a power flux density of -75.6 dBW/m at the receive sites.[23] Comments are requested on the protection of receive sites as proposed above.

49 *Equivalent Isotropically Radiated Power (EIRP).* Proposed MDS rules specify the power limitation in terms of EIRP rather than transmitter power.[24] The EIRP is directly related to the signal power radiated from the antenna, and therefore, significant in the determination of service area and interference potential to other stations.

50. It has been proposed in the *Technical Standards FNPRM* to limit the radiated power of a station using an omnidirectional antenna to a maximum of 33 dBW (2000 watts) EIRP. This is equivalent to a 100 watt (20 dBW) transmitter operating into an antenna with 13 dB gain with the assumption that there would be no transmission line losses.

51. It has also been proposed to limit the radiated power of a station according to the following formula:

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[23] In order to be afforded this protection, ITFS licensees who add receive sites outside the protected area will be required to file an application, and receive an authorization, for modification of their present facilities.

[24] *Technical Standards FNPRM*, ¶¶ 5-21.

$EIRP_{Max} = EIRP_{omni} + 10 \log (360/BW)$

in which $EIRP_{max}$ = EIRP in the direction of maximum gain in dBW

$EIRP_{0mni}$ = the EIRP of a station that uses an omni- directional transmitting antenna in dBW

BW = the total horizontal plane beanmwidth of the station's transmitting antenna system measured at the one half-power points. (Stations using more than one antenna in their system will use the total beamwidth of all antennas).

We propose to adopt these EIRP limits for ITFS and request comments on this matter.

52. *Analysis of Interference potential.* MDS applications must include an analysis of the potential for harmful interference to all existing and previously proposed cochannel or adjacent channel operations located within 50 miles of the applicant's proposed transmitter location. In addition, an existing system operator can agree to accept interference from the proposed system, in which case the proposed system may be granted a license.

53. We propose to adopt the same interference analysis requirements for ITFS applications. If the potential for interference is indicated by the analysis, we believe that the parties involved should have the opportunity to negotiate a mutually acceptable resolution of the problem. This will be taken into consideration in the Commission's decision as to the disposition of the application. Comments are requested on the interference analysis requirements.

54. Finally, we propose to amend Section 74.934(a)(2) of the Rules by relaxing the requirement that unattended ITFS relay stations use the direct heterodyne frequency conversion method. It appears there are ITFS licensees that desire to operate ITFS unattended relay stations with a state-of-the-art type transmitter which would minimize the potential for adjacent channel interference (*e.g.*, such a relay station may demodulate the incoming signal to separate baseband video and audio signals for retransmission). We request comments on amending the rule to allow for this alternative.

55. *Regulatory Flexibility Act Initial Analysis.*

I. Reason for Action

A significant increase in the demand for ITFS frequencies, generated primarily by the Commission's decision to permit ITFS licensees to lease excess channel capacity for commercial purposes, has posed new questions about how the channels should be authorized and used. Many recent applications have presented questions pertaining to eligibility requirements to be an ITFS licensee and the permissible scope of the service. In addition, the demand for channels has resulted in numerous mutually

exclusive applications. The *Further Notice* addresses question necessary to update the 20 year old rules governing the ITFS service, looking toward a more efficient utilization of the ITFS spectrum, the growth and development of ITFS and the adaptation of the service to modern needs. Modification of the rules pertaining to procedural requirements and protection standards will aid in the efficient and expedited processing of applications.

II. The Objective

The Commission solicits comments on Part 74 of its Rules governing the authorization and operation of ITS facilities. Specifically, it would inquire into the scope of permissible service, eligibility requirements, control of shared facilities, procedures for "cutting off" applications accepted for filing, selection procedures for mutually exclusive applicants, and interference protection standards. The comments will assist the Commission in amending the rules as necessary to assure the efficient utilization of the spectrum and to accelerate the growth of ITFS.

III. Legal Basis

The proposed action is authorized by Section 303 of the Communications Act of 1934, as amended, which requires the Commission to prescribe the nature of licensed services, study new uses of frequencies and prescribe the qualifications of licensees.

IV. Description, Potential Impact and Number of Small Entities Affected

The action would invite comments on issues affecting all ITFS licensees and potential applicants. The entities include nonprofit educational institutions such as colleges, universities, public and private secondary and elementary schools. Any policies and rules established through this proceeding would be expected to produce the favorable impact of aiding the growth and development of ITFS and to increase the efficient use of the spectrum.

V. Recording, record keeping and other compliance requirements

None.

VI. Federal Rules which overlap, duplicate or conflict with this rule

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objectives

The Commission's alternative is to leave the rules unchanged. This alternative would not accomplish the objectives sought to be achieved by this proceeding.

56. For purposes of this nonrestricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that substantial disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments, pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1201 of the Commission's Rules.

57. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before September 17, 1984, and reply comments on or before October 2, 1984. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

58. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and five copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional six copies.

Members of the general public who wish to express their interest by participating informally in the rule making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission's Dockets Reference Room (Room 239) at its headquarters in Washington, D.C. (1919 M Street, Northwest).

59. For further information concerning this proceeding, contact Jerry Thomas or Joel Margolis (legal/policy) and Henry Allen (technical). Distribution Services Branch, Mass Media Bureau, (202)632-9356.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Further Notice of Proposed Rulemaking in Mass Media Docket 83-523 (ITFS Licensing Policies)

The Commission by this Further Notice solicits comment on a broad array of issues concerning the nature, purpose and method of operation of the instructional television fixed service. In light of the recent decision in *National Association of Broadcasters* v. *FCC*,[1] one of the questions that also must be resolved is how best to put this service into compliance with the regulatory classification guidelines outlined by the Court.[2] Having already considered the matter, I believe the answer is straightforward.[3] However, I do not have a corner on wisdom and it may be that there are other approaches that satisfy the requirements of this case. My colleagues' unfortunate head-in-the-sand approach (*i.e.*, refusing to admit the existence of a problem by failing even to solicit comment on this question),

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[1] No. 82-1926, slip op. at 13-27 (D.C. Cir. July 24, 1984); *United States Satellite Broadcasting Co* v. *FCC*, slip op. at 19-20 (D.C. Cir. July 24, 1984).

[2] By default, ITFS is presently considered a private, non-broadcast service. *See* Notice of Proposed Rulemaking in Docket 80-112, 45 Fed. Reg. 29,323 (1980). Now that we permit ITFS licensees to lease excess capacity to MMDS programmers, that classification plainly must be revised. Under the teaching of *NAB* v. *FCC*, the dissemination of radio communications is broadcasting within Section 153(o) if it is intended for reception by the general public, whether or not the activity is advertiser-supported or paid for directly by subscribers. Most, if not all, service that can now be provided on ITFS frequencies, meets this test.

[3] *See Amendment of Part 74 in Regard to Instructional Television Fixed Service*, MM Docket No. 83-523, ____, FCC 2d ____, adopted July 26, 1984 (Statement of Commissioner Henry M. Rivera, Dissenting in Part); Remarks of Commissioner Henry M. Rivera before ALI-ABA Course of Study on Communications Law: The New Regulatory and Technological Framework, Washington, D.C., March 29, 1984.

not only puts the status of ITFS operations at legal risk, but deprives this agency of useful public input. I hope, by this statement, to solicit such input.

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Commission affirmed its Decision granting cellular nonwireline application to the applicant whose proposed system covers more area and population; identified and analyzed demand more reliable and designed its system based on its analysis of demand.
—*MCI Cellular Telephone Co.*
CC Docket No. 82-796

FCC 84-369

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	CC Docket No. 82-796
MCI Cellular Telephone Company	File No. 26111-CL-P-(14)-82
Celcom Communications Corporation	File No. 26157-CL-P-(11)-82
Cellular Mobile Systems of Pennsylvania, Inc.	File No. 26184-CL-P-(16)-82
For a Construction Permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Pittsburgh, Pennsylvania, Standard Metropolitan Statistical Area	

MEMORANDUM OPINION AND ORDER

Adopted July 26, 1984; Released August 3, 1984

BY THE COMMISSION: COMMISSIONERS QUELLO & DAWASON CONCURRING IN THE RESULT.

1. Celcom Communications Corporation of Pittsburgh (Celcom) has filed a Petition for Reconsideration of the Commission's *Decision* in this proceeding.[1] MCI Cellular Telephone Company (MCI) filed an Opposition, and Cellular Mobile Systems of Pennsylvania, Inc. (CMS) filed a Response to the petition. Additional responsive pleadings were also filed.[2] For the reasons given below, we affirm our *Decision*.

Background

2. In our *Decision* we affirmed the *Initial Decision* (*I.D.*) of former Chief Administrative Law Judge Lenore G. Ehrig. *MCI Cellular Telephone Company*, FCC 83D-43, released July 29, 1983. The I.D. granted the application of MCI and denied the mutually exclusive applications of Celcom and CMS. Judge Ehrig concluded that MCI's application was superior under designated issues (a) and (b),[3] and that a grant of MCI's application would best serve the public interest, convenience and necessity. CMS and Celcom filed exceptions concerning virtually every aspect of the *I.D.* and MCI filed an exception to one point. Oral argument was held in this case and the companion Chicago Cellular Proceeding on January 10, 1984. Our *Decision* affirmed the *I.D.* with modifications and affirmed the grant of MCI's application.[4] We found MCI's application slightly preferred under designated Issue (a), based on a slight preference for its superior coverage of area and population; a preference for its analysis of the extent and distribution of demand; and a slight preference for the manner in which it proposes to accommodate local demand. CMS received

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[1] MCI Cellular Telephone Company, FCC 84-61, released March 6, 1984.

[2] Celcom also filed a Request for Stay. This request was denied by Memorandum Opinion and Order, FCC 84-310, released July 11, 1984.

[3] The applications were designated for comparative hearing on the following issues: (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service; (b) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service; (c) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and (d) to determine in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity. MCI Cellular Telephone Co. (Pittsburgh Designation Order), 52 RR 2d 1104 (Com. Car. Bur. 1982) (Footnotes omitted).

[4] Our *Decision* explicitly adopted and incorporated by reference the findings of Fact and Conclusions of Law of the *I.D.*, except as specifically modified by the *Decision*.

a slight preference under Issue (c) for its rate structure.[5]

Discussion

Issue (a)

3. *Geographic Area and Population.* Celcom contends it was not "reasoned decision-making" to award coverage preferences on the basis of Carey contours when in the same decision the Commission rejected Carey propagation predictions on matters involving system design.[6] In addition, Celcom alleges it is not in the public interest to award preferences on the basis of the minor contour differences exhibited in this case.

4. CMS agrees with Celcom that the Commission erred in limiting consideration of geographic coverage to the calculation of the boundaries created by the service area contours. It argues that coverage in this case involves areas in which there are no demonstrated indicia of demand. CMS also argues that the Commission's decision is fatally flawed by its failure to consider comparatively and to credit the superior efficiency, flexibility and service reliability obtained from CMS' system, by virtue of its substantial multiple cell overlap.

5. We are not persuaded that our decision was incorrect. The designated issue calls for a comparison of the geographic area and population to be served. The record supports the finding that MCI covers more area and population than either Celcom or CMS. MCI proposed to serve 13.6% more area than Celcom and 7.1% more area than CMS; it proposed to serve 33,713 more persons than CMS (1.4%) and 93,831 more persons than Celcom (4.1%). In addition, MCI's "pockets" of coverage — the areas covered by MCI and not covered by the other applicants — were more significant and contained more major highways, areas adjacent to highways, and other fringe areas than the other applicants' pockets. *Decision* at paras. 12 and 13. Moreover, we have previously rejected Celcom's argument that MCI has proposed service to potentially wasteful and uneconomical areas. *Decision* para. 14. No evidence has been presented to cause us to depart from this finding.

6. Celcom also argues that MCI should not have been awarded a preference for coverage on the basis of Carey contours, because the Carey method's prediction of coverage is imprecise and likely to change. We reject this argument. The Carey Report was adopted as the Commis-

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[5] A more detailed history of this proceeding can be found in our *Decision, supra,* at paras. 1-8.

[6] Carey, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service", FCC Report No. R-6406 (1964), commonly known as the "Carey Report", set forth a computation method which is used in predicting radio wave propagation for the PMRS. These predictions are used to determine the service contour (furthest points at which 90 percent reliable service is provided).

sion's interim standard for determining system coverage for regulatory purposes, pending the development of more definitive propagation models. *See* Section 22.903(c) of the Rules; *Cellular Communications Systems*, 86 FCC 2d 469, 508 (1981), *modified on other grounds* 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub. nom. United States v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). The designation order therefore set the Carey contours as the basis for comparison of the applicants' coverage. We recognize that the Carey Report may be imprecise under certain circumstances and that actual implementation of a cellular system may require some alternative propagation analysis, but for the purpose of comparing applicants, the Carey method has been prescribed as a standard, absent a suitable alternative propagation study. No alternative study has been submitted. Under these circumstances MCI's superior coverage based upon Carey contours establishes the superiority of its proposal.[7] Consequently, we affirm our decision to compare applicants' proposals on the basis of their 39 dBu contours.[8]

7. We also reject CMS' contention that we ignored its argument that its depth of coverage system design is superior to the designs of MCI and Celcom. In the *I.D.*, the judge concluded that CMS was not entitled to a comparative preference for its depth of coverage design. *I.D.*, at paras. 58-59. The judge found that, to the extent that greater depth of coverage was necessary, MCI's proposal included consideration of this factor. In our *Decision*, we considered every contention raised by CMS with regard to its depth of coverage design, and modified the *I.D.* where ever appropriate.[9] However, after consideration of the applicant's proposals, we specifically found that CMS' proposal was not superior to the other proposals. *Decision*, at para. 42. Accordingly, we find CMS' arguments without merit.

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[7] In contrast, we have avoided detailed comparisons of applicants' technical proposals in order to promote diverse technical approaches to cellular service. *See* Cellular Communications Systems, *supra*, 86 FCC 2d at 507; Cellular Lottery Report and Order, FCC 84-150, released May 24, 1984, at para. 19.

[8] Celcom also argues that our rejection of Carey for intra-system interference determinations mandates our rejection of Carey for coverage purpose. We disagree. In our Decision, *supra*, at n. 23, we declined to extend the use of Carey to intra-system interference determinations because, we found, the carrier-to-interference ratio may be a better tool "for managing the effects of intra-system interference," and intra-system interference is under the control of the licensee. Carey may thus be an overly simplistic approach to intra-system interference matters. On the other hand, the use of a simple approach such as Carey for the administrative task of determining the bounds of system coverage for comparative purposes has the advantage of being readily determined and straightforward.

[9] For example, we modified the judge's conclusions with regard to the intra-system interference and system fine-tuning. *See* Decision, *supra*, at paras. 40-41.

8. *Relative Demand for Service.* Celcom alleges that the preference awarded to MCI was in error because MCI's demand study contained serious methodological errors and thus was no more reliable than the other studies. CMS essentially reiterates Celcom's claims, concluding, however, that it deserved a preference on this issue.

9. We have carefully reexamined the record in this proceeding and conclude our decision was correct. We reject Celcom's allegations that MCI's market studies are not more reliable than the other two applicants'. Based on the record in this proceeding we have concluded CMS' and Celcom's studies are seriously flawed. MCI's studies on the other hand, while not perfect, deserve a preference on a comparative basis. MCI's use of an Intent Translation Scale to adjust its estimates for the "yea saying" bias of the Public Need Survey respondents is adequately explained. Likewise, MCI's subscriber estimates are adequately documented. Upon analyses of such factors as elasticity of demand, changes in the price of the service and equipment overtime, and the realizable demand in terms of potential subscribers (which were estimated in the Public Need Survey), MCI arrived at its subscriber forecasts. MCI Ex. 29. MCI's assumptions and forecasting methodology appear reasonable. In our *Decision* we rejected CMS' contention that MCI's demand studies contained serious methodological errors. Neither CMS nor Celcom have presented any new facts or allegations which have not previously been considered. Therefore, we affirm our award of a preference to MCI for its demand assessment. *Decision,* at para. 22.

10. *Ability to Accommodate Demand.* Celcom and CMS argue that MCI did not warrant a preference under this issue because MCI did not use its market studies in distributing demand within the market, but rather distributed subscriber estimates simply on a population-per-cell basis. In the *I.D.,* Judge Ehrig concluded that MCI's proposal better reflects an understanding of demand for service in the Pittsburgh market. *I.D.* at para. 59. In our *Decision,* we affirmed the judge on this issue, stating that MCI designed its system, distributed demand, and determined its channel allocation plans based on the demand distribution forecasts. *Decision,* at para. 28. Celcom argues that MCI's distribution method should be given no credit because MCI distributed its cells on the basis of population, while its demand estimates were based on households with incomes over $20,000. Accordingly, it argues that there is no basis for preferring MCI for a demand-based system.

11. We have examined the allegations raised by Celcom and CMS and conclude that our decision was correct. The record supports the finding that MCI designed its system, distributed demand throughout the MSA, and determined its channel plans based on its demand distribution forecasts. *Decision,* at para. 28. In its application MCI explained that it

used a population density map to apportion its subscriber forecasts throughout the system. MCI App., Ex. 5, pp. 5-1 to 5-9. In addition, one aspect of MCI's need study examined the specific areas in the Pittsburgh market where respondents would be likely to use cellular service. MCI Direct Case Vol. 3, Appendix 3, pp. A-38 to A-41. *See also* MCI Exhibits 28 and 29. MCI's method of distributing demand based on population and other factors such as demographic and geographic analysis, the Public Need Survey and Selected Industry Survey is reasonable.[10] *Decision* para. 22; MCI Exs. 28 and 29.

12. With regard to the other applicants, there is no record evidence as to the nexus between the demand studies used by Celcom and CMS and their distribution of demand through their systems. Indeed, Celcom has admitted that the distribution of subscribers was not directly derived from its market study. Celcom Rebuttal Exhibit 21, Appendix A, p. 2. Similarly, while CMS used its subscriber estimates to design its system, it does not appear that CMS based those estimates directly on its market studies, and accordingly no preference can be given. *See Decision*, at para. 21. Thus, based on a comparison of each applicant's proposal, we affirm our prior conclusion that MCI should receive a slight preference for its ability to accommodate demand.

Issue (b)

13. *Expansion Plans.* Celcom alleges it should be preferred because its system is more flexible than CMS' and the Commission erred in not giving MCI a demerit for not setting forth its expansion capacity thresholds. CMS also argues that its system deserves the preference because its expansion plan is more flexible.

14. We affirm our conclusion that none of the applicants' proposals warrant a preference on this issue. We disagree with Celcom's and CMS' allegations that MCI deserved a demerit for its lack of specificity as to expansion capacity thresholds. MCI set forth generalized expansion action criteria. (MCI app. Ex. 6.) We will not give MCI a demerit for its lack of specificity because the other applicants' proposals also have shortcomings. *See* para. 44 Decision.[11] MCI clearly specifies a plan for constant monitoring and analyzing of traffic volume patterns and detailed a five-step progression of coordinated expansion activities. (MCI appl. Ex 6, p.

[10] The Public Need Survey consisted of a sample of respondents selected by random digit dialing from households with incomes of at least $20,000. The Selected Industry Survey considered the variables of population density, employment concentration and geographic areas of frequent cellular service usage by likely subscribers.

[11] See *Decision* at para. 45 where we found that, "none of the expansion proposals is set forth in sufficient detail to warrant a preference. Moreover, the record does not establish that any single applicant's expansion plan will be able to accommodate the expected growth in demand for service while the others will not."

2.) Moreover, we expect that any licensee will take action when it believes it to be necessary. As we have stated, we will not favor one valid system design over another. All the applicants appear capable of expanding their systems and no one of the proposals is superior to the others; accordingly, none of the applicants' proposals warrants a preference. *Compare Chicago Decision* at para. 33.[12]

Conclusion

15. We have carefully reviewed the record in this proceeding and conclude that our previous award of a slight preference to MCI for its better coverage of area and population, our award of a preference for relative demand and a slight preference to MCI for its ability to accommodate demand should be affirmed. The slight preference awarded MCI overall under Issue (a) however, outweighs CMS' slight preference under Issue (c). While this is a close case, we affirm our conclusion, that on a comparative basis MCI's application is superior to both Celcom's and CMS' and that the public interest, convenience and necessity will be better served by the grant of MCI's application.[13]

16. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Celcom Communications Corporation IS DENIED.

17. IT IS FURTHER ORDERED, that our grant of the application of MCI Cellular Telephone Company, File No. 26111-CL-P-(14)-82 IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[12] Celcom asserts the award of a slight preference to CMS for its rate structure was erroneous because this also is subject to change. We find no basis for reconsidering our decision under this aspect of issue (c). We awarded CMS a slight preference for its rate structure, not its rates, because it promotes usage-sensitive cost-based pricing. As we stated in the Designation Order issue (c) is not as important as issue (a).

[13] As a last resort, Celcom reiterates its previous request to conduct a lottery in this proceeding. However, as we stated in paragraph 57 of the Decision, the record establishes enough material distinctions among the applicants to enable us to make a choice and therefore a tiebreaker lottery is not needed.

CATV Carriage, Mandatory Signal
CATV Carriage, Must Carry Signal

Petition for declaratory ruling and petitions for reconsideration of Commission decision granting authority to carry a UHF television broadcast station with mandatory carriage rights on the expanded portion of a cable system's basic tier denied.
—*Monterey Peninsula TV Cable*

FCC 84-451

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re:	
Monterey Peninsula TV Cable	CSR-2378
Petitions for Reconsideration	
University Television, Inc.	CSR-2362
Petition for Declaratory Ruling	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1984; Released: October 31, 1984

BY THE COMMISSION: COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

1. The Commission has before it three petitions, filed on June 20, 1984, by University Television, Inc. (UTI), licensee of Television Broadcast Station KUSI-TV, San Diego, California; by Council of UHF Broadcasting (CUB); and by the Association of Maximum Service Telecasters, Inc., the Association of Independent Television Stations, Inc., and the National Association of Broadcasters (jointly known as MST), all seeking reconsideration of the Commission's decision in *Monterey Peninsula TV Cable*, 56 RR 2d 159 (1984) (Order). Monterey Peninsula TV Cable (Monterey) has filed a "Motion to Dismiss and Opposition to Petitions for Reconsideration," to which all those seeking reconsideration have replied.[1] In addition,

[1] In addition, Sainte Broadcasting Corporation, UTI, and CUB have filed comments in this proceeding. These comments are unauthorized under Section 1.45 of the Commission's Rules. Consequently, they will be dismissed.

UTI, on May 11, 1983, filed a "Petition for Declaratory Ruling". In its petition, UTI asks the Commission to find that the on-channel carriage rule, Section 76.55(a)(2), impliedly prohibits a cable operator from reassigning the channel position of a UHF television broadcast station having mandatory carriage rights once such a station's position on a cable system has been established. UTI's petition is opposed by Cox Cable of San Diego, Inc., and the National Cable Television Association, Inc. In view of the similarity of issues raised by UTI's request for declaratory ruling and the above captioned reconsideration petitions, we are today consolidating the above captioned cases for consideration.

CSR-2378 Petitions for Reconsideration

2. The instant proceeding arose as a result of a "Petition for Declaratory Ruling and for Special Relief" filed by Sainte Broadcasting Corporation,[2] licensee of Television Broadcast Station KCBA, Channel 35, Salinas, California. Sainte filed its original petition seeking relief from a then impending change of its channel position on Monterey's cable television system. Essentially, Sainte argued that by switching its channel location to a position on the expanded portion of Monterey's basic tier, Monterey would be violating the Commission's mandatory and on-channel carriage rules. In this regard, Sainte contended that Monterey would be violating the Commission's mandatory carriage rules because cable subscribers who did not receive pay services would be unable to view Station KCBA on its new channel position. Sainte further argued that the Commission's on-channel carriage rule prohibited Monterey from switching the channel position of a UHF must carry station, such as KCBA, once its channel position had been established. The Commission rejected Sainte's arguments and concluded that UHF television broadcast stations with mandatory carriage rights may be moved to the expanded portion of a cable system's basic tier. In so holding, the Commission stated that should a cable operator place such a station on the expanded portion of its basic tier, it must first take reasonable steps to inform those of its subscribers who would otherwise be unable to view the subject station of the availability of free converters.

3. The above noted petitions for reconsideration are procedurally defective, and accordingly they will be dismissed. Section 1.106(b)(1) of the Commission's Rules provides that petitions for reconsideration may be filed by a party to the original proceeding or by any other person whose interests have been adversely affected and who, in addition, can show

[2] Although Sainte has not filed for reconsideration before the Commission, it has filed a Notice of Appeal before the United States Court of Appeals for the District of Columbia Circuit. *Appeal pending sub nom. Sainte Broadcasting Corporation v. FCC*, D.C. Cir. No. 84-1209 (filed May 31, 1984).

good reason why it could not have participated in the earlier stages of the proceeding. Here, none of the petitioners may rely upon the first component of the above rule, since none were parties to the original proceeding.[3] With respect to the second component, although all the petitioners seeking reconsideration allege that either their interests or the interests of their membership were affected by the Commission's Order, neither CUB nor MST offer any explanation of why it was not possible for them to have participated earlier.

4. UTI, in support of the acceptance of its petition, maintains that it had no notice that the Commission's Order would deal with and effectively decide the basic questions of law and policy that it had raised in a separate proceeding now pending before the Commission. We cannot accept UTI's argument that it had no notice as good cause why it could not have participated in the earlier stages of the instant proceeding. The Commission has adopted procedures for giving public notice of petitions filed before it. On July 8, 1983, the Commission placed Monterey's original petition on public notice for 30 days. Cable Television Service Registrations Report No. 541, Mimeo No. 5135 (released July 8, 1983). Any person then had an opportunity to respond to the issues raised therein, and UTI did not. *Selma Television, Inc.*, 29 FCC 2d 522, 524 (1971), *aff'd. sub nom. WCOV Inc. v. FCC*, 464 F2d 812 (D.C. Cir. 1972). Based upon the above, we find that none of the petitioners have shown good cause why they could not have participated at an earlier stage of this proceeding. However, in view of the similarity of issues raised by UTI and those dealt with in our Order, we believe it appropriate to consider UTI's "Petition for Declaratory Ruling". See paragraph 6, *infra*.

5. In addition, none of the petitioners seeking reconsideration have justified the acceptance of their petitions under the public interest standard found in Section 1.106(c)(2) of the Commission's Rules. Section 1.106(c)(2) states that the Commission may grant a petition for reconsideration which relies upon facts not previously presented, where the Commission determines that consideration of the facts relied upon is required in the public interest. Apart from restating prior arguments which have been raised and disposed of in the Commission's Order, the petitioners argue that in considering the original case before it the Commission did not concern itself with the widespread impact that its Order would have upon the UHF television broadcast industry. The petitioners contend that the Commission's Order will result in diminished

[3] In fact, the National Association of Broadcasters (NAB), one of the joint petitioners in the MST reconsideration petition, was specifically excluded from participating in the original decision in this matter. In excluding NAB's comments as untimely filed, the Commission found that the issues raised therein had already been brought before the Commission by Sainte Broadcasting Corporation. Order at n.3.

viewership of UHF television stations because of their inability to reach all of their audience on local cable television systems. CUB and MST further maintain that the Commission's Order is contrary to the intent of the All Channel Receiver Act. Public Law 87-529, approved July 10, 1962, 76 Stat. 150. We find these arguments to be meritless. The Commission's original decision is not contrary to the intent of the All Channel Receiver Act. The All Channel Receiver Act was adopted to insure that over-the-air viewers would have equal access to UHF television broadcast stations. The Commission's Order did not foreclose Station KCBA's access to its audience. In fact, the Commission's Order held that Monterey was providing Station KCBA with access to its audience in conformance with the Commission's mandatory signal carriage rules. Thus, so long as cable subscribers are reasonably informed of the availability of free converters capable of receiving the subject station, we see no widespread impact upon UHF television broadcast station viewership flowing from our Order.

CSR-2362 Petition for Declaratory Ruling

6. In its petition, UTI seeks a declaratory ruling that the Commission's on-channel carriage rule, Section 76.55(a)(2), impliedly prohibits cable operators from switching the channel positions of UHF as well as VHF must carry stations once their channel position has been established on a cable television system. In our Order, the Commission addressed the identical argument which was raised by Sainte Broadcasting Corporation. Therein, we concluded that unlike VHF stations, UHF stations with mandatory carriage rights have no right to demand continued carriage on a specific channel position on a cable television system. In reaching this conclusion, the Commission held:

> . . . that as long as a cable system meets its on-channel carriage obligations it should be free to decide how the other channels are utilized on its system. *Second Report and Order in Docket No. 14895*, [2 FCC 2d 725, 754 (1966)]. To meet its on-channel carriage obligations, in pertinent part, a cable system operator need only carry a VHF television station with mandatory carriage rights on the same channel number on which it is broadcasting over-the-air. *See Teleprompter Cable Communications Corp.*, [42 FCC 2d 1122 (1973)] and *Ausauble Communications, Inc.*, [51 FCC 2d 412 (1978)]. Furthermore, the Commission, in a proceeding denying UHF television stations uniform carriage rights, has found that any discrimination suffered by UHF television stations because they do not have on-channel carriage rights is minimal and largely the result of the technology involved; i.e., cable systems distribute all television signals on VHF frequencies thus requiring the conversion of UHF channels to VHF channels with consequent changes in channel numbers. *Cable Television Service*, 48 RR 2d 553, 557 (1980). [Order at para. 18.]

7. UTI has failed to introduce any evidence in this proceeding which persuades us that the above holding should be modified. UTI contends that the Commission's decision in the *First Report and Order in Docket 14895*, 38 FCC 683, 732 (1965), held that under the Commission's on-

channel carriage rule UHF as well as VHF stations with mandatory carriage rights may not be reassigned to a new channel position on a cable system without the subject station's consent. It is clear, however, that no rule prohibiting channel changes was adopted in that proceeding.[4] In the Second Report and Order, the Commission stated directly that where on-channel carriage was not possible ". . . the CATV operator should be free to decide how the channels on its cable are to be utilized." *Second Report and Order in Docket No. 14895*, 2 FCC 2d at 754. Moreover, as noted in our original decision, the Commission specifically rejected, in the context of a rulemaking petition, the right of UHF television stations to be carried on a specific channel on a cable system. *Cable Television Service*, 48 RR 2d at 557. UTI further contends that the disparate treatment of UHF and VHF stations under the Commission's on-channel carriage rule constitutes a violation of the constitutional right of equal protection.[5] We find no such violation. The variance in treatment between UHF and VHF stations is based upon the inherent technological differences between these two types of stations and thus constitutes a rational classification. See Order at para. 18. Furthermore, UTI has introduced no evidence that it has, or UHF stations in general have, suffered any harm from the operation of the present rule.

8. In view of the foregoing, we find that a grant of none of the petitions for reconsideration would be in the public interest.

9. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed on June 20, 1983 by UTI, CUB and MST ARE DISMISSED.

10. IT IS FURTHER ORDERED, That the comments filed by UTI, CUB and Sainte are also DISMISSED.

11. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by UTI, CSR-2362, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Monterey Peninsula TV Cable Petitions for Reconsideration

The central issues here (and in the underlying *Order*[1]) are whether our must carry rules prohibit a cable operator from arbitrarily relocating a

[4] In any event, UTI has failed to introduce any evidence of abuse in this proceeding.

[5] In addition, UTI asserts that as applied the Commission's on channel carriage rule is contrary to the intent of the All-Channel Receiver Act, *supra*. We have today found this argument to be meritless. See para. 5, *supra*.

[1] *Monterey Peninsula TV Cable*, 56 RR 2d 159 (1984) (Order).

UHF station from its assigned channel and, if not, whether that relocation can be accomplished without first installing free decoders in subscribers' homes. We find our must carry rules do not prohibit a cable operator in either regard. I have previously indicated my reservations about the must carry rules.[2] I write separately simply to reiterate my objection to our continued chipping away of the must carry rules. In addition, this exercise in disjointed policymaking will now embroil us in an ongoing series of factual and legal disputes between cable systems and UHF must carry broadcast facilities. So my tears are not solely of the crocodilian variety.

By this decision, we have seriously undermined the must carry rules for UHF stations. We may have thereby resurrected the discrimination against UHF facilities we so long ago intended to remedy,[3] contrary to statutory and administrative commitments to UHF comparability.[4] More than that, it is unclear how the instant ruling, that UHF stations with mandatory carriage rights have no right to demand continued carriage on a specific channel position on a cable-television system, can be squared with either the letter or the spirit of the Commission's policy against arbitrary relocation.[5] And our "faith" in a converter-installation system that puts the burden on viewers instead of on the cable operator to take positive steps to assure a converter is in the viewer's home gives new meaning to the phrase "tongue-in-cheek".[6]

Instead of dismantling the must carry rules in this illogical, piecemeal way, we should enforce them in good faith pending a comprehensive reexamination.

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[2] *See Authorization of Teletext*, 53 RR 2d 1309, 1333-34 (1983), (Statement of Commissioner Henry M. Rivera in which Commissioner Joseph R. Fogarty joins dissenting in part).

[3] *First Report and Order* in Docket Nos. 14895 and 15233, *Rules re: Microwave Served CATV*, 38 FCC 638, 711-713 and 732-733 (1965).

[4] *See, e.g.*, Comparability for UHF Television (Final Report), FCC Comparability Task Force, P. Gieseler et. al. (September 1980); *Report and Order* in Docket No. 21010, *UHF Television Receiver Noise Figures*, 70 FCC 2d 1176 (1978).

[5] *Rules re; Microwave Served CATV*, 38 FCC at 732. "[O]nce a channel position on the cable is selected, we do not believe it should ordinarily be changed without the station's consent, except to accommodate the signal of a station having higher claims, because it places a higher grade signal over the CATV community."

[6] For a period of twenty years the Commission continued an ongoing rulemaking process design to improve incrementally the ease of UHF tuning vis-a-vis VHF tuning because we believed that the greater difficulty involved in getting a UHF station via a converter represented a "UHF handicap" sufficient to impede development of the UHF television service. Today we affirm that, not only is there no evidence that returning UHFs to converter status causes harm, but also that requiring consumers to go to a CATV system's office, get a converter and install it themselves will have "no widespread impact upon UHF television . . . ." Unfortunately, the majority provides no factual basis for its conclusion that today's television viewers are so much more energetic than their predecessors.

CATV Carriage, Mandatory Signals
CATV Special Relief, Denied
Remand from Court of Appeals

On remand from Court of Appeals in light of new facts, previous decision denying waiver of mandatory signal carriage rules affirmed. —*Quincy Cable TV, Inc.*

FCC 84-425

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
Quincy Cable TV, Inc.	
Quincy, Washington	CSR-1678 WA0295
Petition for Special Relief	

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1984; Released: September 20, 1984

BY THE COMMISSION: COMMISSIONERS RIVERA AND PATRICK ABSENT.

Introduction

1. This proceeding, involving Quincy Cable TV, Inc. (hereinafter "Quincy"), operator of a cable television system serving Quincy, Washington, is now before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit, pursuant to the court's decision in *Quincy Cable TV, Inc. v. FCC*, 730 F.2d 1549 (D.C. Cir. 1984) (*per curiam*). The remand was ordered to enable the Commission "to consider Quincy Cable's claims in light of the current facts," *id.* at 1551; specifically, the expansion by Quincy of its cable system to 32-channel capacity, arranged in various tiers.

2. On November 27, 1979, Quincy requested a waiver of Section 76.57 of the Commission's Rules,[1] to delete Stations KREM-TV (CBS, Channel

[1] Quincy's signal carriage obligations are now determined by Section 76.59 of the Rules, due to the licensing of Television Broadcast Station KCWT (Ind., Channel 27), Wenatchee, Washington. While stations seeking to invoke the mandatory carriage provisions of our Rules would now predicate such requests upon Section 76.59 rather than Section 76.57 of

2), KXLY-TV (ABC, Channel 4), and KHQ-TV (NBC, Channel 6) all Spokane, Washington, from its cable system.[2] Quincy argued that these signals could be received over-the-air without cable so that carriage was unnecessary, and that the channels occupied by these signals were needed to carry alternative programming not otherwise carried on the system. This petition was denied by the Chief of the Cable Television Bureau. *Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter "*Quincy I*"]. Quincy thereafter did not comply with the rules, but filed instead petitions for stay and for reconsideration,[3] and subsequently for review by the full Commission. The Commission affirmed the decisions of the Bureau Chief, however, and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating that the filing of stay, reconsideration, and waiver does not automatically stay the effect of a decision made pursuant to delegated authority. *Quincy Cable TV, Inc.* (Quincy, Washington), 89 FCC 2d 1128 (1982) [hereinafter "*Quincy IV*"].[4] Subsequently, the Commission denied Quincy's request for reconsideration and for mitigation of the forfeiture, rejecting Quincy's statutory and constitutional challenges to the enforcement of the Bureau Chief's decision. *Quincy Cable TV, Inc.* (Quincy, Washington), 93 FCC 2d 412 (1983) ["*Quincy V*"]. Quincy thereupon petitioned for judicial review.

3. Although Quincy had consistently maintained throughout these proceedings that it possessed merely 12-channel capacity, prior to oral argument new facts concerning Quincy's channel capacity came to light, revealing that Quincy had expanded its channel capacity to 32 channels. This led to the remand of the instant proceeding. *Quincy Cable TV, Inc. v. FCC, supra.* On April 11, 1984, the Chief of the Mass Media Bureau, pursuant to the court's remand and to Sections 1.65 and 76.7 of the Rules, ordered Quincy to supplement its filings in this proceeding within twenty

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the Rules, this change has not altered the factual bases entitling the Spokane stations to carriage on Quincy's cable system.

[2] Stations KHQ-TV, KXLY-TV and KREM-TV are entitled to mandatory carriage on the Quincy cable system, pursuant to Section 76.59(a)(6) of the Commission's Rules, since they are significantly viewed in Grant County, Washington, the county in which Quincy's cable system is located. Alternatively, KHQ-TV and KXLY-TV are also entitled to mandatory carriage, pursuant to Section 76.59(a)(5) of the Commission's Rules, since their signals are carried by 100-watt translator stations, K83AJ and K77AO, respectively, which serve the community of Quincy, Washington. *See* Section 76.55(c) of the Commission's Rules.

[3] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter "*Quincy II*"]; *Quincy Cable TV, Inc.* (Quincy, Washington) (adopted September 2, 1981) ["*Quincy III*"].

[4] Following this decision, Quincy resumed carriage of the Spokane licensees on June 3, 1982, on its basic tier.

days, and afforded opposing parties ten days within which to respond. Following a request for extension of time, Quincy filed its supplement on May 14, 1984. KREM-TV, KHQ-TV, and KXLY-TV have responded.

Summary of Pleadings

4. Quincy, in its supplement, notes that it commenced operations in August 1978 with 12 channels, and subsequently expanded to 24 channels in June 1982; it further expanded to 32-channel capacity in January 1983, 27 of which channels are presently utilized.[5] These channels are offered to Quincy's subscribers in six tiers as follows:

Tier	*Number of Channels*	*Subscribers*	*Monthly Charge*
I (Basic)	12[6]	972	$10.95
II	11[7]	192	$5.95
III	1 (home Box Office)	361	$10.95[8]
IV	1 (Cinemax)	172	$10.95[8]
V	1 (The Disney Channel)	119	$10.95[8]
VI	1 (Galavision)	78	$7.00

In addition, Quincy submits what it describes as unsolicited subscriber complaint letters received in April and May 1984, and Quincy's responses to these letters.[9] Quincy contends that, prior to the Commission's denial of Quincy's waiver requests, the system "experienced virtually no subscriber complaints relating to its service offerings." Quincy states that it wishes to place the three Spokane network affiliates on tier II, and replace them on tier I with the more popular CNN and ESPN, formerly carried on

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[5] Quincy states that it would cost the system $6,000 per channel to add additional satellite-delivered services to its program offerings. The 1982 and 1983 expansions cost the system "approximately $250,000."

[6] In addition to Stations KREM-TV, KXLY-TV, KHQ-TV, and KCWT, this tier also includes: Stations KOMO-TV (ABC, Channel 4), KING-TV (NBC, Channel 5), and KIRO-TV (CBS, Channel 7), all Seattle, Washington; KSPS-TV (ETV, Channel 7), Spokane, Washington; WTBS (Ind., Channel 17), Atlanta, Georgia; WOR-TV (Ind., Channel 9), Secaucus, New Jersey; WGN-TV (Ind., Channel 9), Chicago, Illinois; and The Weather Channel. All of these additional services are discretionary.

[7] This tier includes: Station KAYU-TV (Ind., Channel 28), Spokane, Washington; Cable News Network (CNN); local origination; C-SPAN; USA Network; Music Television (MTV); Spanish International Network; CNN Headline News; Entertainment and Sports Programming Network (ESPN); Lifetime; and the Nashville Network. All of these services are discretionary.

[8] For tiers III, IV, and V, subscribers pay $10.95 for the first such service, $8.95 for the second, and $7.95 for the third.

[9] Quincy submitted an additional subscriber complaint letter in a further supplement on May 21, 1984.

that tier, and with a local origination and advertising channel. Some limited local expression is carried currently on the Weather Channel, Quincy avers, and the system does not originate any commercial advertising. Quincy argues that such a tiering arrangement would better serve the public interest than its present scheme does, and would attract a number of lost subscribers.[10] Quincy claims that it is motivated by its subscribers' preferences — particularly those of its senior subscribers who enjoy popular reruns and old movies — which are not met by the Commission's signal carriage rules.

5. KREM-TV, in its response filed May 24, 1984, argues that Quincy seeks to avoid its signal carriage obligations, and "to tier the Spokane signals in order to maximize its profits." This goal, however desirable, is not constitutionally protected, contends KREM-TV, particularly in view of Quincy's increased channel capacity.

6. KHQ-TV responded to Quincy on May 24, 1984, contending that Quincy's arguments are "nothing other than . . . marketing whims and desires . . . ." Unlike the Spokane network affiliates, which are broadcast locally by television translator stations, notes KHQ-TV, the Seattle affiliates, which Quincy prefers not to relocate to a different tier, are not locally available off-air, but are imported by Quincy by its own choice.

7. KXLY-TV opposed Quincy's supplement on May 29, 1984. KXLY-TV argues that Quincy's expansion of its channel capacity has rendered moot the factual basis upon which the system had originally sought special relief, irrespective of Quincy's tiering choices and desires. KXLY-TV contends that Quincy has offered no factual evidence to demonstrate that a waiver of the mandatory signal carriage rules would be in the public interest.

Discussion

8. If Quincy had abided by the representations made in its initial special relief request (that it would carry the signals of KREM-TV, KXLY-TV, and KHQ-TV, at such time as it had the channel capacity to do so), the special relief aspects of this proceeding would now be moot. However, the forfeiture imposed has not been paid and Quincy now continues to press for an exemption from the requirements of the rules. We are not, therefore, in a position to conclude that the controversy has been terminated. In addition, since all of the additional information now on the record goes toward weakening the initial grounds urged for waiver, no reason is presented that would justify any change in the initial decision.

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[10] Quincy states that the prior Commission orders have caused Quincy's basic subscribership to drop from 1,018 to 972, whereas modification of the system's tiered offerings as proposed would cause its subscribership to rise to about 1,200 by January 1985. *But see* note 16, *infra.*

In neither its present pleadings nor in its earlier submissions has Quincy demonstrated by the substantial proof required for grant of a waiver that its request would be consistent with the substantial governmental interests underlying our signal carriage rules as recognized by the Supreme Court.[11] Quincy's request continues to be devoid of concrete evidence showing that grant of a wavier would be consistent with our policies regarding mandatory carriage of significantly viewed signals, and of translator stations serving the community.

9. Quincy's supplemental filings reveal that the system today, even more than before, possesses the capacity to accommodate KREM-TV, KHQ-TV, and KXLY-TV. That Quincy chooses or desires to tier its service and program offerings in one manner or another is principally a matter within the operator's discretion.[12] However, this does not diminish the right of a significantly viewed station to maintain access to its audience through cable carriage, on a cable system's basic tier of service. *Id.* In addition, it is the Spokane network affiliates, whose programming is broadcast locally via translator stations, which also serve Quincy, Washington.[13] The Seattle stations are available in the area only because Quincy has chosen to import their programming by microwave.

10. The remainder of Quincy's arguments are equally unpersuasive. Quincy argues that its 24-hour Weather Channel on Tier I is necessary as a limited outlet for local expression and origination. However, prior submissions by Quincy reveal that this service replaced a full local origination channel in 1982.[14] This is, in fact, as revealed by Quincy's

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[11] *Capital Cities Cable, Inc. v. Crisp*, 52 U.S.L.W. 4803, 4809 (1984); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[12] The degree of this discretion has been discussed in other proceedings. *See, e.g., Monterey Peninsula TV Cable* (Salinas, California), 56 RR 2d 159 (1984), *appeal docketed sub nom. Sainte Broadcasting Corp. v. FCC*, No. 84-1209 (D.C. Cir. May 31, 1984); *Community Cable TV, Inc.*, ____ FCC 2d ____ (1984), *appeal docketed sub nom. National League of Cities v. FCC*, No. 84-1349 (D.C. Cir. July 26, 1984), *appeal docketed sub nom. Public Service Commission of Nevada v. FCC*, No. 84-1350 (D.C. Cir. July 26, 1984), *appeal docketed sub nom. Cable Television Information Center v. FCC*, No. 84-1437 (D.C. Cir. Aug. 23, 1984).

[13] We have previously recognized that translator stations serve the public interest by expanding television service to underserved areas. *See, e.g., Second Report and Order in Docket Nos. 14895, 15233, and 15971*, 2 FCC 2d 725, 757-758 (1966); *Report and Order in Docket No. 15858*, 1 FCC 2d 15 (1965). In fact, on request, translators of 100 watts or higher power are entitled to mandatory carriage on local cable systems. *See, e.g.*, Section 76.59(a)(5) of the Commission's Rules; *Report and Order in BC Docket No. 78-253*, 51 RR 2d 476, 521 n. 81 (1982); *Cable Television Report and Order*, 36 FCC 2d at 174 n. 42; *Docket Nos. 14895, 15233, and 15971*, 2 FCC 2d at 758. In the instant case, it is the Spokane affiliates themselves which have requested carriage, although they are carried on Quincy's system via local translators. *See* Section 76.55(c) of the Commission's Rules.

[14] *See* Quincy's supplement, filed April 21, 1982, in *Quincy IV* proceedings.

current submissions, one of several tiering rearrangements and program substitutions performed by Quincy, many of which occurred prior to the return of the Spokane affiliates to Quincy's system. Indeed, Quincy could have avoided much of its program lineup disruptions had it not deleted the Spokane stations in the first instance, and abided by our rules. We note, too, that Quincy previously has stated that it intended to carry these stations once the system expanded its channel capacity.[15] In view of this history, we cannot say that the voluntary decision by certain of Quincy's subscribers to discontinue their subscriptions is due to any action by this Commission.[16] Moreover, this is underscored by a careful reading of the subscriber letters submitted by Quincy. In addition, that certain program services which Quincy now carries on Tier II may allegedly be more popular than the Spokane affiliates is not grounds for waiver. *E.g., Pioneer Cablevision Corp.* (Endicott, New York), 50 FCC 2d 821, 822 (1975). Having considered "[Quincy's] claims in light of the current facts pertaining to [Quincy's] channel capacity, tier structure, and other factual developments . . .," *Quincy Cable TV, Inc. v. FCC*, 730 F.2d at 1551, we find no reason to depart from our previous decisions, which we view as representing a consistent and rational policy.

11. In view of the foregoing, we find that grant of the waiver requested by Quincy is not in the public interest.

12. Accordingly, IT IS ORDERED, That the objections raised by Quincy Cable TV, Inc. on remand from the United States Court of Appeals for the District of Columbia Circuit ARE DENIED, and our previous disposition of this case IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[15] *E.g.*, petition for special relief filed November 27, 1979, by Quincy in *Quincy I* proceeding, at 8; "Petition for Reconsideration" filed May 28, 1980, by Quincy in *Quincy II* proceeding, at 3; letter filed June 23, 1981, by Quincy in *Quincy II* proceeding.

[16] Despite Quincy's complaints of lost subscribers, we note that the system had only 609 subscribers at the inception of this proceeding. Petition for special relief filed November 27, 1979, by Quincy in *Quincy I* proceeding, at 2.

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Commission affirmed grant of nonwireline cellular construction permit to applicant that proposed to serve greater area and population; provided more reliable analysis of extent and distribution of demand; demonstrated superior ability to accommodate local demand for service; and proposed more flexible plan for system expansion. —*Rogers Radiocall, Inc.*
CC Docket No. 82-721

FCC 84-370

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	CC Docket No. 82-721
Rogers Radiocall, Inc.	File No. 26040-CL-P-(18)-82
and	
Cellular Mobile Systems of Illinois, Inc.	File No. 26181-CL-P-(34)-82
For a Construction Permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Chicago, Illinois, Standard Metropolitan Statistical Area	

MEMORANDUM OPINION AND ORDER

Adopted July 26, 1984; Released August 3, 1984

BY THE COMMISSION: COMMISSIONERS QUELLO AND DAWSON CONCURRING IN THE RESULT.

1. Cellular Mobile Systems of Illinois, Inc. (CMS) has filed a Petition for Reconsideration of the Commission's *Final Decision (Decision)* in this proceeding, *Rogers Radiocall, Inc.*, FCC 84-62, released March 6, 1984. Rogers Radiocall, Inc. (Rogers) filed an Opposition to the petition, and CMS filed a Reply.[1] For the reasons given below, we deny reconsideration.

Background

2. In our *Decision* we affirmed the *Initial Decision (I.D.)* of Chief Administrative Law Judge Thomas B. Fitzpatrick. *Rogers Radiocall, Inc.*, 96 FCC 2d 1194, FCC 83D-49, released 8/17/83. The *I.D.* granted Rogers' application and denied the mutually exclusive application of CMS. Judge Fitzpatrick concluded that Rogers' application was superior under all of the designated issues[2] and that a grant of Rogers' application would best serve the public interest, convenience and necessity. CMS filed exceptions to the *I.D.* and a Motion to Reopen the Record. Responsive pleadings were filed.[3] Oral argument was held in this case and the companion Pittsburgh cellular proceeding on January 10, 1984. Our *Decision* affirmed the *I.D.* with modifications and affirmed the grant of Rogers' application.[4] We concluded that Rogers merited a slight preference for its superior coverage of geographic area and population and preferences for its more reliable analysis of demand and its superior ability to accommodate demand for local service. In addition, we found Rogers to be entitled to a slight preference for its more flexible expansion plan. These preferences accorded to Rogers outweighed a slight preference awarded to CMS for

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[1] CMS also filed a Motion for Stay Pending Reconsideration. This request was denied by Memorandum Opinion and Order, FCC 84-311, released July 11, 1984.

[2] The applications were designated for comparative hearing on the following issues: (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service; (b) to determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service; (c) to determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and (d) to determine in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity. Advanced Mobile Phone Service, Inc. (Chicago Order), 91 FCC 2d 512, 520-521 (1982) (footnotes omitted).

[3] Under our expedited hearing procedures for cellular, exceptions to the *I.D.* were taken directly to the Commission. 47 CFR § 22.916(b)(9).

[4] Our *Decision* explicitly adopted and incorporated by reference the findings of Fact and Conclusions of Law of the *I.D.*, except as specifically modified by the *Decision*. Thus, the *I.D.* and the *Decision* should be viewed together.

its proposed rate structure.[5]

3. CMS advances three main grounds for reconsideration. First, CMS alleges that the Commission's preference of Rogers under Issue (a) was based on a misperception of the evidence. CMS contends that our *Decision* failed to compare the applicants' relative capabilities to provide service to portables and to accommodate demand for service. Secondly, CMS argues that its expansion plan is not less flexible than Rogers' and that it should have received a preference under Issue (b). Finally, CMS contends that we committed "legal error" in comparing market study methodologies.

Discussion

4. *Issue (a).* CMS argues it should be awarded a preference on this issue because of several benefits of its "depth of coverage" proposal,[6] which it asserts the Commission did not consider. It contends that we ignored its argument that depth of coverage provides better service in the event a cell is temporarily removed from service or blocked due to full loading or where there is an unanticipated surge or shift in demand.

5. We are not persuaded by CMS' arguments. In the *I.D.*, Judge Fitzpatrick concluded, for a number of reasons, that CMS' proposed depth of coverage did not merit comparative credit. The judge noted that CMS' depth of coverage advantage would be reduced by cell-splitting and sectorization and that "CMS ha[d] failed to demonstrate that the cell overlap in Rogers' system would be insufficient to accommodate demand." *I.D.*, Conclusions, para. 5. In our *Decision*, we considered every contention raised by CMS with regard to its depth of coverage, and modified the *I.D.* where appropriate.[7] Although we did not explicitly reject every contention raised by CMS, we reviewed these arguments and found no basis to overturn the judge's conclusion that Rogers' proposal is superior to CMS'. *Decision, supra,* at para. 14. Thus, the suggestion that we ignored certain alleged advantages in CMS' system is totally unfounded.

6. CMS also contends that it should receive a preference for its ability to accommodate demand. CMS bases this contention on evidence it submitted tending to prove that buildings could obstruct radio signals, causing "dead spots" and that signal strength inside a building would be substantially less than on the street outside. CMS would provide a greater degree of cell overlap in metropolitan Chicago and around O'Hare

[5] A more detailed history of this proceeding can be found in our *Decision, supra,* at paras. 1-5.

[6] A depth of coverage system proposal utilizes extensive cell overlap.

[7] For example, we modified the judge's conclusions as to the validity of depth of coverage system design and its potential for intra-system interference. *See* Decision, *supra,* at paras. 40-41.

International and Midway Airports. CMS therefore concludes that it should receive a preference.

7. We are not persuaded by CMS' arguments on this point. Rogers has proposed a significant degree of cell overlap in the metropolitan Chicago area. We reject the notion implicit in CMS' argument that more cell overlap is necessarily better. Awarding a preference simply because one applicant has a greater degree of cell overlap — without a showing that the public interest would be served thereby — would reward system overbuilding. This would impose substantial costs on the public. Moreover, even if CMS had demonstrated that its greater cell overlap would provide some benefits, we are still convinced that Rogers' market-specific design is better able to accommodate demand overall.

8. In this regard also, CMS asserts that we did not compare the applicants' relative ability to accommodate demand, but only their design methodologies. This contention is based upon a misreading of our *Decision.* Judge Fitzpatrick concluded that Rogers had provided a significantly more reliable analysis of the extent and distribution of demand in Chicago and that Rogers' proposed system design, particularly its channel allocation, was based upon its demand forecasts. We affirmed these conclusions in our *Decision*, noting that an applicant can design a system to accommodate demand only by projecting the extent and distribution of demand to be served. While both applicants attempted to project demand for cellular service, both Judge Fitzpatrick and the Commission concluded that Rogers' analysis of demand was significantly more reliable than CMS'. We therefore affirmed the Judge's conclusion that Rogers' system — which was designed on the basis of an analysis of the Chicago market — was better able to accommodate demand for service than CMS'.[8]

9. However, CMS argues, as it did in its exceptions to the *I.D.*, that we must compare the applicants with regard to the number of channels they propose to allocate to a given geographic area, rather than the number of channels allocated to individual cells. We undertook this analysis in our *Decision* and found, contrary to CMS' contention, that Rogers had allocated more channels in likely high demand areas. *Decision*, para. 30, n. 30. Indeed, CMS has submitted an exhibit with its petition that is intended to show that it has allocated its channels to areas of the MSA containing what it considers to be indicia of likely high demand.[9] A comparison of maps of the applicants' CGSAs reveals, however, that Rogers has a greater percentage of its channels allocated to areas with heavy concen-

[8] CMS employed a standard design model, with no demonstrated relevance to the Chicago market, to produce a semi-uniform channel distribution. *I.D.*, Findings, para. 20.

[9] These include household density, high income household density, private employment density and traffic volumes.

trations of these demand indicia than does CMS.[10] Rogers' proposal is thus superior to CMS even using CMS' own standard.

10. Finally, CMS makes a further argument pertaining to our treatment of Issue (a). CMS asserts that it has been denied due process because it was not given notice that the Commission intended to compare demand survey methodology. However, in CMS' Rebuttal Case CMS stated that "[t]he Commission has advised that subscriber surveys evidencing public need for cellular are central to a comparative consideration of applicants' respective coverage proposals." CMS then goes on to analyze "[d]eficiencies in Rogers' methodology." CMS Rebuttal Exhibit V, p. 1. Clearly, CMS not only had notice of the bases of comparison[11] but urged us to make the very analysis that it now asserts was improper. CMS also complains that we downgraded its market research merely because it failed to demonstrate the reasonableness of its assumptions or the validity of its conclusions.[12] We evaluated all of the evidence presented to us. CMS has not demonstrated that our conclusions regarding its survey methodology were in error. Nor can we agree with CMS' contention that we treated the applicants "unequally" by finding Rogers' assumptions reasonable and CMS' assumptions unsupported. It is the purpose of a comparative hearing to determine the differences between the competing applicants. Determining such differences does not amount to unequal treatment. Therefore, CMS' arguments concerning this issue are rejected.

11. *Issue (b).* CMS asserts that we erred in concluding that its expansion plan is "inherently somewhat less flexible than Rogers' proposal." *Decision*, para. 43. We observed that, if CMS' demand projections proved to be significantly mistaken, then CMS' 34-cell system might not be responsive to the needs of the market. CMS argues that its extensive cell overlap will allow it to reallocate channels to take account of

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[10] Percentage of voice channel availability was the standard of comparison chosen by CMS in this exhibit. It is worth noting that, even if CMS had a greater percentage of voice channel availability in these areas than Rogers — which it does not — this would not necessarily entitle it to a preference. Rogers has a greater number of channels in its system; therefore, even if Rogers' percentage of voice channel availability were lower in a given area it might still have a greater capacity to accommodate demand.

[11] In addition, Section 1.363 of the rules requires that all statistical studies offered in evidence in common carrier hearing proceedings be supported by a summary statement delineating the assumptions made and explaining the methodology used. This rule section by itself should have given CMS notice that the applicants' survey methodologies were subject to careful scrutiny.

[12] In fact, we did use the demand projections made by CMS in assessing its coverage proposal and its ability to accommodate the demand that it had projected. Beyond this, however, the public interest requires that we compare applicants based on their *relative* ability to accommodate demand in the market. Based upon Rogers' significantly more reliable analysis of the level and distribution of demand in the Chicago MSA and its system design, we found Rogers to be superior in this regard.

shifting demand. We continue to believe that Rogers' phased-in expansion approach is more flexible than CMS' proposal and therefore it is preferred. Rogers will gain valuable experience in its initial operational phase. This experience will enable Rogers not only to locate its expansion cells to take account of actual demand but also to take account of actual propagation characteristics. If greater cell overlap is in fact required in order to serve Chicago, as CMS contends, then Rogers will be able to determine, based on its experience, where additional cells are needed. CMS would build its much larger system without the benefit of this experience. Rogers' proposal is therefore more flexible than CMS'.

12. CMS also alleges that Rogers' expansion plan lacks sufficient detail to merit a preference. CMS cites *MCI Cellular Telephone Company* (*Pittsburgh Decision*), FCC 84-61, released March 6, 1984, where we held that none of the applicants had presented sufficiently detailed expansion plans to merit a preference. However, CMS' allegations in this proceeding have already been rejected. *I.D.*, para. 25, n. 30. CMS has presented no new evidence to persuade us that Rogers' expansion plan lacks sufficient detail to merit a preference. Accordingly, we affirm the slight preference accorded to Rogers for its more flexible system expansion plan.

Procedural Matters

13. On May 22, 1984, CMS filed a Petition to Reopen the Record. This petition neither relies on facts relating to events that have occurred since CMS filed its Petition for Reconsideration nor demonstrates good cause why the Commission should accept this pleading. Instead, it reiterates arguments that CMS made in at least six earlier pleadings, including the instant Petition for Reconsideration.[13] The substance of these arguments has been carefully considered at each stage of this proceeding and CMS' arguments have been rejected each time. Nothing would be gained by revisiting these contentions yet again. Indeed, we are concerned that this request, which was filed seven weeks after the Petition for Reconsideration, may have been designed to delay the Commission's resolution of this case and to evade our rules.[14] To delay the provision of service to the

[13] CMS has raised these arguments concerning the applicants' demand survey methodologies in its Rebuttal Exhibit V, pp. 1-14; its Proposed Findings of Fact and Conclusions of Law, pp. 16-24 and 70-72; its Reply to Proposed Findings of Fact, pp. 4-8; its Exceptions to the *I.D.*, pp. 15-23; its Petition for Reconsideration, pp. 21-25; and its Request for Stay Pending Reconsideration, pp. 7-8. These arguments were considered and rejected by the presiding judge, *I.D.*, Findings, paras. 10-16; Conclusions, paras. 6-7; and by the Commission, *Decision*, paras. 15-26.

[14] This petition appears to be an attempt to evade the page limitation of Section 1.106(f) of the rules, in that it elaborates upon arguments contained in CMS' Petition for Reconsideration, pp. 21-25. Furthermore, the relief requested by CMS' latest pleading

public would grossly disserve the public interest and undermine the goals of our expedited procedures for cellular service. Although the relative merits of the applicants' proposals could be debated endlessly, this proceeding must, at some point, reach its conclusion. We therefore reject CMS' Petition to Reopen the Record and caution all applicants to refrain from filing repetitious and dilatory pleadings.

Conclusion

14. We continue to believe that the grant of Rogers' application will best serve the public interest. CMS' petition fails to present any substantial matters which would warrant reconsideration. For the most part, CMS repeats arguments raised in the exceptions which we considered fully and rejected in our *Decision.* Those points that we have not specifically addressed we do not find to be of decisional significance.

15. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Cellular Mobile Systems of Illinois, Inc. IS DENIED.

16. IT IS FURTHER ORDERED, That the grant of the application of Rogers Radiocall, Inc., File No. 26040-CL-P-(18)-84 IS AFFIRMED.

17. IT IS FURTHER ORDERED, That the Petition to Reopen the Record filed by Cellular Mobile Systems of Illinois, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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was not requested by the Petition for Reconsideration or a timely supplement thereto as required by Section 1.106(f). CMS' request is therefore untimely as well as repetitious.

Business Radio Service, Frequencies
Frequency, Efficient Use of
Rules, Exemption From
Rules, Failure to Conform
Rules, Violation of
Frequency Loading

Memorandum Opinion and Order adopted affirming Private Radio Bureau's deletion of 800 MHz channels for failure to meet the loading requirements of Rule 90.366(d).
—*Texas Two-Way, Inc.*

FCC 84-376

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application for Review of

Specialized Mobile Radio Station WQA-505, licensed to Texas Two-Way, Inc. Fort Worth, Texas

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 1984; Released: August 7, 1984

BY THE COMMISSION:

1. The Commission has for consideration Texas Two-Way Inc.'s (Texas Two-Way) Application for Review of an Order issued by the Private Radio Bureau on December 16, 1983.[1] The Order denied Texas Two-Way's Petition for Reconsideration of the Bureau's February 25, 1983, determination which deleted 15 of the licensee's authorized channels for Specialized Mobile Radio System (SMRS) WQA-505. In its Application for Review, Texas Two-Way seeks reversal of the December 16 Order and reinstatement of its full 20 channel authorization.

2. There is a waiting list of 16 SMRS applicants desiring channels in the Dallas/Fort Worth area. Reassignment of the channels deleted from

[1] On March 28, July 16, and July 27, 1984, Texas Two-Way filed Petitions for Leave to Supplement Application for Review and Supplements to Application for Review. The Petitions are granted and the supplements accepted for consideration.

Texas Two-Way's authorization has been held in abeyance pending the outcome of our determination.

Background

3. Texas Two-Way's license was granted on September 4, 1980, for a 20 channel system to be constructed in stages. Rule 90.375(e), then in effect, required an SMRS licensee which elected to construct in stages to build five channels within one year of license grant and to load the system to 70 percent of five channel capacity (350 mobiles) within two years of grant.[2] For Texas Two-Way this meant that its first five channel stage had to be constructed by September 4, 1981, and loaded to 70 percent of capacity by September 4, 1982.

4. On June 24, 1982, within three months of the date when it was to have loaded its first five channels, Texas Two-Way attempted to change its construction method from five channel stages to construction of all 20 channels at once.[3] The licensee sought through approval of this change to retain all twenty channels and to gain five years to load them to 70 percent of capacity. The requested change of election was denied by the Bureau on August 11, 1982, because once the first year had elapsed Texas Two-Way had already availed itself of the benefit of staged construction, i.e. not having to build all twenty channels within the first year.[4] In spite of the Bureau's denial of Texas Two-Way's request to change its election, Texas Two-Way constructed 20 channels at its new location when an application to modify its transmitter location was granted on September 20, 1982.

5. The station was inspected by Commission engineers on November 1 and 2, 1982. Twenty channels had been constructed and were operational, but only 129 mobile units were using the system. As a result, the Bureau notified Texas Two-Way, by letter dated February 25, 1983, that 15 of its channels were being taken back for reassignment to SMRS applicants on the Dallas/Fort Worth area waiting list. The letter stated that the action was being taken in accordance with the Commission's policy set forth in

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[2] With the adoption of our *Second Report and Order*, PR Docket 79-191, *et al.*, 90 FCC 2d 1281 (1982), which became effective on October 16, 1982, the rules governing SMR systems were revised and renumbered. Rule 90.375 became Rule 90.366, but the construction and loading requirements did not change for existing licensees.

[3] With its July 27 supplement, Texas Two-Way informed the Commission that it did this on the advice of the Manager for Government and Industry Relations for the E.F. Johnson Company. Texas Two-Way was informed that his advice was based on advice he had received from a staff member of the Private Radio Bureau. Texas Two-Way makes no argument concerning the import of this information. We do not find that it has any merit.

[4] This action was affirmed by the Bureau on reconsideration on February 16, 1983, and by the Commission on October 19, 1983. *Texas Two-Way, Inc.*, FCC 83-472 (released October 26, 1983) *recon. denied* FCC 84-108 (released April 5, 1984).

its *Memorandum Opinion and Order*, Docket 18262, 51 FCC 2d 945, 986 (1975) and Rule 90.366(d).

6. On March 28, 1983, Texas Two-Way filed a Petition for Reconsideration of the Bureau's action, which was supplemented by submissions on April 27, May 25 and October 25, 1983. The licensee also filed a request for rule waiver dated April 27, 1983. Texas Two-Way contended that the Bureau's action constituted a revocation of its license pursuant to Section 312 of the Communications Act of 1934, as amended, and as such it was entitled to a hearing on the matter; that if its license was not revoked then it was modified pursuant to Section 316 of the Act and as such it was entitled to a hearing on the matter; and that good cause existed in any event for the granting of its petition because it had encountered unforeseen problems in meeting the Commission's loading requirements. The licensee also argued that it had been treated differently than another licensee in Texas which had also attempted to change its construction election. By its Order of December 16, 1983, the Bureau denied Texas Two-Way's petition and waiver request.

Discussion

7. With the exception of the "different treatment" issue, Texas Two-Way makes the same arguments before us that it raised with the Bureau.[5] Its main emphasis, however, centers around the licensee's contention that its failure to meet the loading requirements was due to circumstances beyond its control. Texas Two-Way states that after construction of its first five channel stage was completed, construction of a new office building near its transmitter site was begun. By June 1981, Texas Two-Way discovered that the building interfered with its signal and it began getting complaints from its customers in July 1981. According to Texas Two-Way, the interference was caused by the unusual, metallic glass used in the building. Since Texas Two-Way's management did not know that such glass would be used, or that it would cause interference, the licensee asserts that the time spent finding and moving to a new site location and the failure to load which resulted from such delays were due to unforeseen circumstances beyond its control.

8. In *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983) and *P & R Temmer*, 93 FCC 2d 1051 (1983) we held that equipment problems and

[5] The "different treatment" issue was previously considered and rejected by us when we denied Texas Two-Way's change of election request. *Texas Two-Way, Inc., supra* n. 3, at para. 11. However, in its March 28 supplement Texas Two-Way again raises the issue concerning another Texas licensee. Texas Two-Way states that based on the Bureau's Licensing Division history cards, the licensee does not appear to have been loaded on its two year anniversary date. This argument is erroneous. At the time the Bureau began its "take back" program every licensee was examined for compliance. The one mentioned by Texas Two-Way was found to be loaded.

transmitter location choice were not circumstances beyond the licensee's control but were the result of the licensee's independent business judgment in choosing its equipment and site location. *AAT* at 1046; *Temmer* at 1060. Similarly, Texas Two-Way's initial decision in choosing its transmitter site, its selection of a second transmitter site and its decision to build its entire 20 channel system after the Bureau had denied its change of election request were all circumstances within its control. These choices and those involved in *AAT* and *Temmer* are the types which could be faced by any SMRS licensee. As a general rule in these kinds of circumstances we will not relieve the licensee of its obligations under the rules. The Commission cannot insure an entrepreneur against such problems at the expense of other entrepreneurs who are waiting to use the spectrum. *See Temmer* at 1062.

9. It is also clear that Texas Two-Way cannot claim relief based on the interference caused by the metallic glass. Even if this was unforeseeable and beyond its control, Texas Two-Way's subsequent failure to promptly and appropriately respond to the interference, and not the interference itself, is responsible for its inability to meet the loading requirements. Texas Two-Way knew three months before the first year was to elapse that it had encountered a problem, however, it waited another year to apply for a change of sites, at the same time availing itself of the benefit of only constructing five channels. While Texas Two-Way is correct that approval of its change of transmitter location could not be obtained until the F.A.A. had approved its proposed tower structure, the speed in which it found a new site and applied for F.A.A. approval was solely within its control. Texas Two-Way did not request such approval until eight months after the problem was detected.[6] Finally, it was only after it was notified by the Bureau that its channels were being taken back that the licensee chose to submit a request for rule waiver. That request was not renewed in this application for review. A licensee cannot be excused for failing to meet the conditions imposed on its license when it decides not to take the appropriate action to meet the loading requirements after a problem is detected.

10. Texas Two-Way faults the Bureau for not going into a detailed explanation of how it reached its conclusion, which according to Texas Two-Way should have included a discussion of the purpose for our loading requirements. We do not agree. The Bureau's decision was based on our

[6] Commission records indicate that Texas Two-Way's request for F.A.A. approval was not submitted until February 23, 1982, and it was approved by the F.A.A. less than two weeks later, on March 5, 1982. Texas Two-Way also mentions, as a circumstance beyond its control, that there was a delay in getting site approval from the city of Arlington, Texas. However, there is no Commission requirement for approval from the local jurisdiction before an application can be submitted.

decisions in *AAT* and *Temmer*, both of which did discuss the reasons for the loading requirements. This was not a case of first impression. Furthermore, Texas Two-Way has not complied with the purpose of the rules. The rules were designed not only to require the licensee to demonstrate its financial commitment, but also to get the ultimate user of the system, the person who needed communications in his business, on the air as soon as possible. *Memorandum Opinion and Order*, Docket 18262, 51 FCC 2d 945 (1975). As we pointed out in denying Texas Two-Way's request for change of election, Texas Two-Way did not meet these requirements. *Texas Two-Way, Inc., supra* n. 3, at para. 10.

11. Nor does Texas Two-Way's construction of 20 channels and its recent agreement for $650,000 of new mobile units demonstrate compliance with the rules. Implicit in that argument is a plea to let the licensee keep its channels because it has incurred a sizable expense. Texas Two-Way's system complied with neither the construction nor the loading requirements of the rules. The sizable expense was incurred after Texas Two-Way's change of election request had been turned down and the new equipment appears to have been ordered after the Bureau took back 15 of its channels. We decline to give Texas Two-Way any credit for its noncompliance with our rules. *AAT, supra* at 1047. Likewise, we will not give Texas Two-Way any credit for its claim in its July 16 supplement that as of July 12, 1984 it had "over 1200" users on its system. The licensee's exercise of its procedural rights does not extend the time in which the system must be loaded. *Smith Communications Systems, Inc.*, FCC 84-30 (released February 2, 1984), at para. 8.

12. We also find Texas Two-Way's remaining arguments unpersuasive. The question of whether Texas Two-Way was entitled to a hearing in this case and whether Rule 90.366(d) should have been applied to Texas Two-Way's system are issues which have already decided in the *AAT* and *Temmer* cases. In those cases we determined that the deletion of channels was not modification of a license, but an enforcement of construction and loading conditions which were placed on all licensees at the time of license grant and as such no hearing was required. *AAT* at 1048; *Temmer* at 1061-2. We also held that Rule 90.366(d) did not change the substantive construction and loading requirements for licensees in existence at the time it became effective and therefore was not *ex post facto* in nature. *AAT* at 1045. We further said that even if the substantive requirements had been changed we still had the authority to apply the rule to existing licensees. *Id.* at 1045-6. We find nothing in this case which causes us to depart from those determinations. Similarly, the licensee's argument that our decision in reconsidering the *Second Report and Order* in Docket 79-191, *Memorandum Opinion and Order*, PR Docket No. 79-191, 48 Fed. Reg. 51917 (November 15, 1983), was not taken into consideration by the

Bureau and should be considered by us is without merit. Texas Two-Way has previously argued before us, in its Petition for Reconsideration of our denial of its change of election request, that that decision relaxed the loading standards for SMRS licensees. We rejected that argument in denying the petition and adhere to that holding here. *Texas Two-Way, Inc.*, FCC 84-108 (released April 5, 1984) at para. 3.

Conclusion

13. None of Texas Two-Way's arguments persuade us to grant its Application for Review or to reverse the Bureau's decision. Accordingly, Texas Two-Way's Application for Review is DENIED and the 15 channels will be routinely reassigned by the Bureau.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Competition, Common Carriers
Control, Transfer of, Authorized
Digital Transmission Systems

Order adopted granting transfer of control of U.S. Telephone, Inc.'s licenses and authorizations to United Telecommunications, Inc. Acquisition of U.S. Telephone, Inc., an interexchange carrier, by United Telecommunications, Inc., primarily an exchange carrier, found to promote competition. DTS applicants granted thirty days after their merger to decide which DTS application to pursue.
—*United Telecommunications, Inc.*

FCC 84-272

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
United Telecommunications, Inc. and U.S. Telephone, Inc.	File No. ENF-84-8
Application for Consent to Transfer Control of U.S. Telephone, Inc.	File No. W-P-C-5377

MEMORANDUM OPINION AND ORDER

Adopted June 15, 1984; Released June 20, 1984

BY THE COMMISSION:

1. Before the Commission is an application filed by United Telecommunications, Inc. (United) and U.S. Telephone, Inc. (U.S. Tel), pursuant to Sections 214 and 310(d) of the Communications Act as well as Parts 21 and 63 of the Commission's Rules, seeking consent to transfer control of U.S. Tel's licenses for intercity telephone and domestic radio services to United. The application provides that United will acquire all the issued and outstanding shares of U.S. Tel's common stock in exchange for United common stock. The purchase price is approximately $80 million. For the reasons discussed below, we conclude that transfer of the subject licenses will serve the public interest, convenience, and necessity, and, accordingly, we grant the application.

2. *The Applicants.* United is a holding company with four operating groups, United Telephone System, Inc. (United Telephone), United Telecom Communications, Inc. (United Telecom), United Communications Systems and United Telecom Computer Group. United Telephone is the nation's ninth largest exchange telephone carrier. It consists of twenty operating companies organized into nine regional groups. It serves approximately 2.9 million access lines and 4.4 million leased telephones. United Telephone operating companies primarily serve small-to-medium size cities and rural areas. They provide local exchange service and exchange access for toll services. In 1982, approximately 2.7% of the nation's telephones were in United service areas; service to these subscribers accounted for 2.3% of total exchange revenues. The operating companies had revenues of $1.8 billion for 1982. Approximately 60% of these revenues were derived from toll services, usually under settlement agreements with AT&T.[1]

3. United Telecom consists of ISACOMM, Inc., which provides satellite-based interstate communications in 22 cities, and Uninet, Inc., a digital packet switching network operating in more than 200 American cities and some international locations. Together they offer a variety of intercity voice, video, document and data communications services for businesses.[2] The United Communications System group consists of six entities which distribute telecommunications, electrical, security and alarm products. The fourth group, United Telecom Computer, offers a variety of computer products and services.

4. U.S. Tel is a resale common carrier. It was granted a Section 214 authorization for intercity telephone service in 1979 and began operations the next year. U.S. Tel offers 24-hour intercity long distance service from approximately 88 points of origin to the entire United States. U.S. Tel does not provide originating service to any city directly served by a United Telephone operating company. Its services are available through its network of switches and intercity circuits. Although U.S. Tel's network is primarily utilized for voice communications, it has the capability for transmission of data, facsimile, teleprinter and other enhanced services.[3] U.S. Tel's revenues were approximately $80 million in 1982. While its 1983 revenues were about $131 million, U.S. Tel lost $4.8 million in income.[4]

5. *The Proposed Acquisition.* United and U.S. Tel have executed an Agreement and Plan of Reorganization, and Agreement and Plan of Merger under which the proposed transfer of control will take effect,

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[1] United 1982 Annual Report Form 10-K, at 5. These settlement agreements have been replaced by access tariffs and interim contracts.

[2] *Id.* at 15; ISA Communications Services, Inc., 90 FCC 2d 938 (1982).

[3] U.S. Tel 1982 Annual Report Form 10-K, at 1.

[4] United SEC Form S-14, filed March 2, 1984, p. 66.

subject to our approval. Under the Plan of Reorganization, United will acquire all of the issued and outstanding shares of common stock of U.S. Tel.

6. Under the Plan of Merger, U.S. Tel will remain an independent corporate entity. It will be part of the United Telecom operating group. The president of U.S. Tel will report to the President of U.S. Telecom who in turn reports directly to the Chairman of the Board of United. By placing U.S. Tel in the United Telecom group, the operations of the resale carrier will be kept totally separate from United Telephone's operations. United states in its application that the two entities will not have common accounting systems, operating personnel, marketing, engineering, network development, operations, installation, maintenance, or research and development.

7. The applicants maintain that approval of the proposed transfer of control will be in the public interest. United claims its intent is to increase greatly U.S. Tel's resources, particularly by furnishing financial support, which will enable U.S. Tel to achieve its goal of becoming a nationwide provider of information transmission and enhanced services. The applicants expect that this infusion of capital will make U.S. Tel a more effective and viable participant in the intercity telecommunications marketplace.

8. United believes it too will benefit if the proposed transfer of control is approved. It wishes to increase its participation in the intercity telecommunications market and believes that acquiring U.S. Tel is the most effective way quickly to achieve that goal. United contends that U.S. Tel's resale services will complement United's specialized intercity offerings and enable it to provide end-to-end service to its customers. It notes that U.S. Tel has an established name, customer base, switching and transmission capacity, marketing and sales force, and network management groups. The applicants maintain that the acquisition will serve the public interest by making each of them a more viable participant in the telecommunications marketplace, thereby increasing competition.

9. *Competing DTS Applications.* First Communications Group (First Communications) and U.S. Tel are currently competing for mutually exclusive licenses for authority to construct and operate a Digital Termination System (DTS) network to provide Digital Electronic Message Service (DEMS) in Chicago, Illinois.[5] United Telecom's subsidiary, ISACOMM is also applying for a DTS license in Chicago. Under Section

[5] DTS refers to two-way, point-to-multipoint microwave radio facilities made up of local collection and distribution stations, each providing two-way transmission links to multiple outlying stations located at user premises. These facilities can be used to provide DEMS, which is an intercity communications system. Digital Termination Systems, 86 FCC 2d 360, 361 n.1 (1981).

21.502(a) of the Commission's Rules, an entity cannot pursue two DTS licenses in the same area at the same time. The applicants acknowledged this conflict in their transfer-of-control request and asked that they be given sixty days after the grant of their application to decide which DTS application to pursue.

10. First Communications objects to the applicants' request. First Communications contends that the applicants should have determined which DTS license application to pursue prior to submitting their transfer of control application. Further, First Communications argues that the applicants' request, which is actually a request for a waiver of the Commission's Rules, is founded merely upon their convenience and serves no public interest. Finally First Communications requests that if we do approve the application for transfer of control, that we grant United and U.S. Tel only 30 days to make their choice.

11. United and U.S. Tel respond that First Communications does not raise arguments which warrant denial of the transfer of control application. They maintain that they have no intention of holding two DTS licenses in one city in violation of the Commission's Rules. United and U.S. Tel claim they are merely asking for a short period of time subsequent to the grant of the transfer of control application to make their choice concerning the DTS applications.

12. While we are not persuaded to deny the transfer of control application because of the problem of the competing DTS applications, we are likewise not persuaded to allow United and U.S. Tel sixty days to make their choice as to which application to pursue. Under Section 21.23(c)(6) of the Commission's Rules, a substantial change in ownership of the applicant requires a major amendment. This in turn requires the application be placed on public notice again and the Commission is precluded from acting upon it for thirty days. *See* Section 21.27 of the Rules. If United and U.S. Tel were afforded sixty days to make their choice, a potential license for First Communications would be held in abeyance for at least ninety days. This is too long a delay simply to accommodate a competing applicant's particular circumstances. Therefore, United and U.S. Tel have thirty calendar days after the date we grant their transfer of control application to determine which DTS application to pursue.[6]

13. *Competitive Issues.* MCI Telecommunications Corporation (MCI) raises several competitive issues in its petition to deny. MCI argues that

[6] The applicants point out that we allowed GTE Corporation and Southern Pacific Communications Company sixty days after we granted their transfer of control application to choose which DTS license to pursue. GTE/SPCC, 94 FCC 2d 235, 261-62 (1983). However, in that situation, there was no claim by a competing applicant that it would be harmed by a sixty-day delay.

the Commission should not permit United Telephone, a local exchange monopolist, to participate in competitive, long-distance markets through acquisition of U.S. Tel as the combination of the two companies will resemble the pre-divested AT&T. It claims that the acquisition would lessen competition by reducing the number of interexchange carriers. While MCI concedes that the Commission rejected this argument in the acquisition of Southern Pacific Communications Company (SPCC) by GTE Corporation (GTE), *GTE/SPCC*, 94 FCC 2d 235 (1983), it contends that the Commission erred in that decision. MCI's second argument is that United Telephone, as the sole exchange carrier in its service areas, is capable of favoring U.S. Tel by declaring it the default carrier for long distance traffic and/or by providing it with premium access. In view of these arguments, MCI asks that we condition the grant of the subject application upon a commitment and schedule for United Telephone to implement equal access in its service areas. In addition, MCI asks that we prohibit U.S. Tel from originating traffic from a United Telephone service area prior to the provision of equal access in that area.

14. In their response to MCI's petition, the applicants point out that MCI raises essentially the same arguments here as it did in opposing the acquisition of SPCC by GTE. The Commission rejected those arguments in that proceeding and it should reject them again here, according to the applicants, because their relatively modest sizes negate all of MCI's antitrust arguments. They argue that the Commission rejected MCI's argument that the acquisition of SPCC by GTE would create an entity similar to that of the pre-divested AT&T because the determining factor was not the structure of the company but its market share. *GTE/SPCC*, 94 FCC 2d at 254. These applicants maintain that as each has even a smaller market share than either GTE or SPCC, MCI's argument should be rejected again.

15. United and U.S. Tel contend that the Commission should not preclude U.S. Tel from originating traffic from a United Telephone service area prior to the provision of equal access. They argue that timing is important so that U.S. Tel can be among the choice of interexchange carriers available for equal access presubscription to customers in those exchanges. If United Telephone is compelled to wait until equal access is implemented, the applicants are concerned that many customers would have already made their choice and thus entry for another carrier would be difficult.

16. The U.S. Department of Justice (DOJ) decided not to challenge the proposed merger due to the size of the two firms, the size and dispersion of United's franchise areas, and the specific plans of the two firms following the proposed acquisition. However, it retained the authority to take appropriate remedial action should United fail to abide by the

antitrust laws. Department of Justice Release, April 27, 1984. Then on May 15, 1984, DOJ filed a Motion for Acceptance of Late Comments and Comments regarding the transfer of control. *See* FCC Public Notice, May 16, 1984. In its Motion, DOJ explained that in its April 27, 1984 Release it states that if the Commission approved the transfer of control it might consider imposing appropriate conditions on the parties. The purpose of the Comments, according to DOJ, is to describe those conditions. We find DOJ's Comments raise issues relevant to this proceeding and accordingly we will grant its Motion.

17. DOJ states that while it takes no position on whether the Commission should grant the application, should it be approved DOJ recommends that two conditions be imposed. It suggests we impose specific equal access obligations on United, pursuant to a fixed schedule. While DOJ acknowledges that United states in its application that it will provide equal access, United failed to specify when this would become available. DOJ notes that United is capable of quickly providing equal access, on a fixed schedule, in all its exchange areas.

18. The second condition proposed by DOJ is that United and U.S. Tel be required to maintain structural separation. DOJ wants to prevent United from misallocating costs between its local exchange companies and U.S. Tel's interexchange facilities.

19. MCI and the Applicants filed comments responsive to DOJ's filing. MCI generally agrees with DOJ's position and urges us to impose the conditions. The Applicants contend that the conditions are unnecessary due to their voluntary commitment to structural separation and the on-going Commission proceedings designed to set industry-wide standards for equal access.

20. An examination of the competitive consequences of the proposed transfer of control is part of our responsibilities under Section 214 and 310(d) of the Act. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country," the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[7] Under Section 11 of the Act, moreover, this Commission is obliged to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[8] The courts have construed this to mean that "the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those conse-

[7] 15 U.S.C. §18.

[8] 15 U.S.C. §21.

quences with other public interest factors."[9] In other words we are required to consider anticompetitive consequences as one part of our public interest calculus.[10]

21. The applicable judicial precedents direct that the Section 7 analysis begin with a determination of the relevant market in which competition may be threatened.[11] To ascertain the market affected for purposes of Section 7, we must delineate both the relevant "product" market (*i.e.*, the "line of commerce") as well as the relevant "geographic" market (*i.e.*, "section of the country").[12] The most recent Department of Justice Merger Guidelines (Guidelines) assist us in this endeavor.[13] In particular, we have found them useful in defining the relevant product and geographic markets; ascertaining the type of merger involved (*i.e.*, horizontal or non-horizontal); and, finally, evaluating the impact of the proposed merger on competition in those markets. There are both horizontal and non-horizontal elements here, but as we discuss below, neither would appear to threaten competition.

22. United provides a limited amount of interexchange telecommunications services through ISACOMM and Uninet, subsidiaries of its United Telecom operating group. Since U.S. Tel also provides interexchange telecommunications services, the acquisition has horizontal characteristics. An important factor in our Clayton Act analysis of a horizontal merger is the market shares of the companies proposing to merge.[14] Our initial task is ascertainment of the relevant product market. For the narrow purposes of this proceeding, we define the relevant product market of products competing with the interexchange services of United Telecom and U.S. Tel as all domestic interexchange telecommunications services. *See GTE/SPCC*, 94 FCC 2d at 250; *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities and Authorizations Therefor*, 48 Fed. Reg. 52452, 52456 (November 18, 1983) (Fourth Report). The geographic market is traditionally defined as the area in which sellers of the particular product operate. A national geographic market for these carriers' interexchange services is warranted because of

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[9] U.S. v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[10] *Id.* at 87.

[11] U.S. v. E. I DuPont de Nemours and Co., 353 U.S. 586 (1957); United States v. Continental Can Co., 378 U.S. 441 (1964); Standard Oil Co. v. United States, 337 U.S. 293, 299-300 n.5 (1949); U.S. Department of Justice, Merger Guidelines-1982, 2 Trade Reg. Rpts. (CCH) para. 4500, at para. 4502 (Guidelines).

[12] Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

[13] While the standards set forth in the Guidelines do not have the force of law and are not binding on the Department of Justice, the courts, or this Commission, a number of courts have nevertheless accepted them as a useful tool in analyzing mergers. U.S. v. Hammermill Paper Co., 429 F. Supp. 1271, 1280 (W.D. Pa. 1977).

[14] *See generally*, Guidelines, *supra*; Philadelphia National Bank v. U.S., 377 U.S. 321 (1963).

supply and demand substitutability, even though United Telecom and U.S. Tel do not offer originating interexchange services nationwide. *U.S. v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350 (1970); *GTE/SPCC*, 94 FCC 2d at 250; *Fourth Report*, 48 Fed. Reg. 52452, 52460.

23. Available data show that both U.S. Tel and United Telecom have a *de minimus* share of the interexchange telecommunications market.[15] In 1983, U.S. Tel's revenues were approximately $131.3 million[16] while United Telecom's were approximately $23.7 million.[17] AT&T had toll service revenues of $34.5 billion in 1983.[18] Also, there have been a number of successful entrants in the market; in 1983, MCI had total revenues of $1.3 billion, Sprint of $740 million and U.S. Transmission Systems of $163 million.[19] We find that this acquisition will not increase substantially concentration in the market but rather will enable two small entities to compete more effectively with the larger entities already operating in the relevant market. *GTE/SPCC*, 94 FCC 2d at 251. The horizontal elements of this acquisition will not lessen competition.

24. This acquisition also has non-horizontal characteristics because a local exchange carrier is seeking to acquire an interexchange carrier. In considering whether the non-horizontal elements of the proposed acquisition would substantially lessen competition, we must consider both the actual potential entrant and the perceived potential entrant doctrines. According to these doctrines, a firm may enter the market either *de novo* or by acquiring a small (toe-hold) firm rather than entering by acquisition of a major competitor. Acquisition of a major competitor would eliminate the potential entrant, and, therefore, reduce the level of future competition. Even if a firm might not have actually entered the market, it could be perceived by those in the market to be a potential entrant. Under the perceived potential entrant doctrine, the threat of entry of a firm on the fringe of the market could constitute a restraining influence on the behavior of the existing firms. The removal of that influence by acquisition, therefore, would have a substantial effect on competition. *U.S. v. Marine Bancorporation*, 418 U.S. 602 (1978); *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

25. We find the proposed acquisition will not impair competition under either of these doctrines. United is acquiring only a "toehold" in the market by acquiring U.S. Tel, a firm with a very modest share of the market and critical financial problems.

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[15] United and U.S. Tel Opposition to MCI's Petition to Deny, p. 12.

[16] United SEC Form S-14, filed March 2, 1984, p. 66.

[17] United 1983 Annual Report Form 10-K, p. 20.

[18] AT&T 1983 Annual Report Form 10-K, Financial Section p. 2.

[19] Letters filed with the Commission pursuant to 47 C.F.R. §43.21.

26. Also, we do not find this acquisition anticompetitive in terms of vertical integration; we therefore reject DOJ's proposal, supported by MCI, that we impose two conditions on the acquisition. We are presently conducting a rulemaking to address the problem of equal interconnection vis-a-vis all the independent telephone companies. *MTS and WATS Market Structure, Phase III*, 94 FCC 2d 292 (1983). Our intent is to require the independent telephone companies to offer equal access on a basis similar to that required for the divested Bell Operating Companies under the Modification of Final Judgment.[20] Further, "... access to interstate services is required to be offered pursuant to access tariffs which are subject to our regulatory review and jurisdiction." *Phase III*, 94 FCC 2d at 206.[21] We do not here require United to provide equal access on a specific schedule.[22] United points out in its Comments that contrary to DOJ's assertion, all its facilities are not readily adaptable to provide equal access. We note this problem is not confined to United: "[W]e must be mindful that truly equal access to carriers' exchange facilities is not immediately possible ... in the Independents' areas because of intrinsic limitations on existing facilities." *Phase III*, 94 FCC 2d at 304. However, while we do not here require United to provide equal access pursuant to a fixed schedule, we impose a condition on the acquisition: United Telephone must make available access arrangements on the same terms and conditions to all Other Common Carriers, including U.S. Tel.[23]

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[20] United States v. Western Electric, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[21] In GTE/SPCC, we stated: "The potential for unequal treatment will be greatly diminished, if not eliminated, with the implementation of our recent access charge plan. MTS and WATS Market Structure, FCC 82-579, released February 28, 1983 (Access Charge Order). There, the Commission has set forth a plan to prescribe the compensation that exchange carriers should receive for origination or termination of all interstate and international services. Under the terms of that plan, GTE as well as other exchange carriers are required to file tariffs utilizing the same rate structure for like access service. We fully intend as part of our tariff review process to examine whether each carrier has complied with the anti-discrimination provisions of the Communications Act, 47 U.S.C. §202(a). In addition, interested persons will have the right to petition against these tariff filings and bring to our attention any discrimination or preference." GTE/SPCC, 94 FCC 2d at 255. *See also*, CC Docket No. 83-1145, FCC No. 84-188, released April 27, 1984; Exchange Carriers Access Tariff Order, FCC 84-51, released February 17, 1984; Non-Exchange Carrier Access Tariff Order, Mimeo No. 2802, released March 7, 1984.

[22] We recognize that GTE agreed, pursuant to a consent decree with DOJ, that its telephone operating companies will provide equal access to interexchange carriers on a schedule. *U.S. v. GTE Corp.*, Civil Action No. 83-1298 (D.D.C., filed May 4, 1983). However, the Commission did not initiate such action and we simply noted it as a factor in finding that the transfer of control was not likely to give SPCC a preference over other interexchange carriers. GTE/Sprint, 94 FCC 2d at 240, 255.

[23] By this condition, United cannot designate U.S. Tel as the default carrier in United's exchange areas.

27. We also deny DOJ's proposal that we impose structural separation requirements on United and U.S. Tel. United states in its application that it intends to place U.S. Tel in its United Telecom operating group, thus keeping its local exchange operations (United Telephone) separate from its long distance ones (United Telecom). Given United's intentions, we find it unnecessary to require structural separation as a condition for grant of its application. *See American Satellite Corporation*, 80 FCC 2d 254, 255 (1980). Should any abuses occur, we have the authority to impose such a condition or other sanctions.[24]

28. Finally, we reject MCI's argument that the acquisition is anticompetitive because the new structure would resemble that of the pre-divested Bell System. We rejected that argument in the *GTE/SPCC* decision because " . . . there is a substantial difference in size between the current Bell System and the proposed combined GTE/SPCC." *GTE/SPCC*, 94 FCC 2d at 254. Here, there is a greater disparity in size between the pre-divested AT&T and the combined United and U.S. Tel.

29. Therefore, we conclude that, in view of the relatively modest amount of revenues and limited scope of operations of the applicants and the condition requiring nondiscriminatory access, competition will not be lessened by approval of the acquisition. In fact, the acquisition may increase competition by creating an entity which should be able to compete effectively with larger interexchange carriers. We find unpersuasive MCI's arguments that approval of the acquisition will have anticompetitive consequences.

30. *Financial Qualifications.* In its petition to deny, MCI argues that the application lacks the financial information necessary for the Commission to evaluate United's capability to acquire U.S. Tel. Specifically, MCI claims that United does not identify the amount and source of capital United plans to infuse into U.S. Tel in the next five years nor discuss the financial and operational impact of the acquisition on United's operating companies.

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[24] MCI reports that United recently acquired a 9.8 percent interest in the Southern New England Telephone Company (SNET). MCI asks that we delay action on the application until we gather additional information about the purchase. While our Public Notice stated that no replies would be accepted, United nonetheless filed a Reply concerning this issue because MCI raised it for the first time in its Comments. We accept the Reply. United explains that its acquisition is for investment purposes only and as such it may not participate in the management of the company. *See* 15 U.S.C. §7(A)(C)(9). United also represents that when U.S. Tel seeks to provide service in SNET service areas, it will obtain access through tariffs, as would any other carrier. We find United's 9.8 percent interest in SNET is insufficient to cause "significant vertical anticompetitive consequences" as alleged by MCI. Furthermore, we have reviewed the terms of SNET's switched access tariff and are reviewing the terms of SNET's special access tariff to ensure that they do not provide for unreasonable discrimination that may favor U.S. Tel.

31. In response, the applicants state that United is paying about $80 million for U.S. Tel. As its 1983 revenues were approximately $2.5 billion, over 30 times the acquisition price of U.S. Tel, they maintain that United is certainly financially qualified to purchase U.S. Tel. Further, as United maintains it will keep U.S. Tel's operations separate from its local exchange business, after the initial investment capital used for U.S. Tel will not be derived from its local exchange operations. Finally, they point out that United Telephone's operations are regulated by state agencies which will further ensure that ratepayers are protected. In view of United's description of its financial situation, we find United financially qualified to acquire U.S. Tel and that United's exchange operations should not be harmed by this acquisition.

32. Having found this transfer is in the public interest, IT IS ORDERED, pursuant to 47 U.S.C. §§151(i), 214 and 310(d), That the application of United Telecommunications, Inc. and U.S. Telephone, Inc. for consent to transfer control of U.S. Telephone Inc's. licenses to United Telecommunications, Inc. IS GRANTED subject to the following condition:

> United Telecommunications, Inc. will make available access arrangements on the same terms and conditions to all Other Common Carriers, including U.S. Telephone, Inc.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Application for Review
Fairness Doctrine, Controversial Issue of Public Importance

Application for review of Mass Media Bureau rulings which denied Fairness Doctrine Complaint denied. Complainant failed to establish (1) need issue, (2) current controversial issue, and (e) whether evidence submitted was properly evaluated.
—*Yes to Stop Callaway Committee*

FCC 84-118

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of

Yes to Stop Callaway Committee

against

Television Station KTVI St. Louis, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1984; Released: August 9, 1984

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Mass Media Bureau's December 1, 1982 and July 19, 1983 rulings, filed August 22, 1983,[1] by the Yes to Stop Callaway Committee.[2]

[1] Copies of these rulings are attached as Appendix A. The complaint is detailed in these documents and will not be repeated herein.

[2] The initial complaint was filed April 13, 1982 by the Yes Committee, a nonprofit campaign committee registered with the Missouri Secretary of State. This committee was set up to promote the following ballot issue in the November 2, 1982 general election:

> A nuclear power plant may be operated in this state only if an acceptable site (or sites) for the permanent storage of radioactive waste from the plant is capable of receiving such waste.

On January 24, 1983, the Commission was informed that the Yes Committee had changed its name to the Yes to Stop Callaway Committee. Instead of advocating the above stated ballot issue, this committee is promoting a new ballot issue for the 1984 general election which states:

> A nuclear power plant may not be operated in this state.

Background

2. In July 1973 Union Electric Company (UE) announced that it would seek approval to build a nuclear power plant and in April 1974 it applied to the Nuclear Regulatory Commission (NRC) for a construction permit. In June 1974 UE applied to the Missouri Public Service Commission (PSC) for a certificate of convenience and need. In March 1975 the PSC approved a two unit generating plant.[3] These units shall be referred to herein as Callaway I and Callaway II. The NRC granted UE a limited work authorization in August 1975 and a construction permit in April 1976. Since one of the construction activities involved waterways, the Army Corps of Engineers gave their approval in November 1977.

3. In 1980 the PSC held a series of hearings on UE's generating capacity.[4] "Yes" states that these proceedings, which lasted for nearly a month, examined "energy need forecasting methods, costs of alternative facilities and addition of generation facilities including the addition of Callaway Unit II to the Company's electric plant." "Yes" points out that during the course of these hearings arguments were made with respect to the need for Callaway I and II. A decision was rendered in these proceedings nearly three years later on May 20, 1983. However, with respect to the evidence submitted on the need for Callaway I and II, a final determination was not made. Instead, with respect to the need for Callaway I, "Yes" states that this issue was joined in another matter pending before the PSC. As to the need for Callaway II, that issue was rendered moot by UE's October 9, 1981 announcement to cancel its plans to construct a second generating unit.

4. Approximately three weeks after UE cancelled its plans to construct Callaway II, television station KTVI aired a series of spots regarding the Callaway Nuclear Plant. This series consisted of approximately 200 spots which ran from October 1981 through February 1982. Another series of 75 spots, similar in content and length to the first, aired

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For purposes of simplicity we shall refer herein to both of the foregoing committees as "Yes."

[3] By a March 14, 1975 Report and Order (Case No. 18,117) the Missouri Public Service Commission approved a two unit generating plant. This Report and Order was affirmed by the Circuit Court of the County of St. Louis in *State of Missouri v. Public Service Commission*, Case No. 367749 (January 7, 1976), *aff'd sub nom. State Ex Rel Utility Consumer Council v. Public Service Commission*, 562 S.W. 2d 688 (1978). A few weeks prior to the airing of the first series of spots Union Electric cancelled its plans to construct the second generating unit. Therefore, the fairness issue raised by the complainant throughout this proceeding concerns itself with the first unit, referred to herein as Callaway I.

[4] According to St. Louis Post Dispatch articles of May 21 and 22, 1983, submitted by "Yes," the generation capacity hearings began in August 1979 and were "argued nearly a year later."

from April 26, 1982 to June 6, 1982.[5] The third series, which repeated 25 spots from the second series, ran in August 1982. In response to KTVI's airing these spots, "Yes" filed a complaint alleging that KTVI had addressed only one side of a controversial issue of public importance. "Yes" defined the issue as "the need for, and the desirability of the Callaway nuclear plant." The complainant stated that the issue of the need for the Callaway nuclear plant was to be addressed in the rate base hearings to be held when construction was completed and the plant fully operational. It appears from two newspaper articles which "Yes" has submitted, that these hearings will take place at the beginning of 1985.

Bureau Rulings

5. In its initial ruling of December 1, 1982, the Bureau found the licensee to be unreasonable in concluding that the subject spots did not address "the need for, and the desirability of, the Callaway nuclear plant" in an obvious and meaningful manner. Nevertheless, the Bureau sent a further inquiry to the licensee to determine whether the stated issue was controversial at the time the subject spots were aired.[6] The Bureau, in its ruling of July 19, 1983, found that the licensee was not unreasonable in determining that the need for the Callaway nuclear plant had already been decided through the regulatory process by 1978 and was no longer a controversial issue of public importance. In addition, with regard to the decision that had yet to be rendered in the generation capacity hearings (see paragraph 3, above) and was eventually issued after the complaint was filed (see paragraph 11 below), the Bureau found that the complainant made no showing to indicate that the question of need will or can be reexamined as a result of this hearing. Accordingly, the Bureau found the licensee was not unreasonable in concluding that the issue of need was no longer an open issue in that proceeding. Finally, the Bureau found the licensee was not unreasonable in concluding that issues to be discussed in a future rate base hearing were not controversial at the time the spots were aired.

Application for Review

6. In its Application for Review, "Yes" states that determining whether an issue is subject to the Fairness Doctrine "is not solely a function of whether the issue is a topic of regulatory hearings or legal proceedings." Therefore, the complainant asserts, the Bureau, by finding the regulatory process had already decided the issue of need, had too narrowly construed the Commission's requirements for establishing an

[5] The spots that ran in the first and second series are described in Appendix B.

[6] With regard to the "Yes" December 2, 1982 ballot referendum on storage of radioactive waste, the Bureau found that KTVI was not unreasonable in concluding the subject spots did not address the waste disposal issue.

issue's controversiality. Also, in this regard, "Yes" asserts that neither the Bureau nor KTVI "acknowledged the large amount of evidence, including newspaper articles and campaign materials," which it had submitted to establish that the stated issue was subject to vigorous debate in the St. Louis community.

7. "Yes" further argues that since the question of need will be examined in the upcoming rate base hearings, this fact establishes that the issue of need has not been resolved. Therefore, "Yes" asserts, contrary to the licensee's position, the need issue is not a closed question and must be considered "a 'current controversy' even if the ads discussing need were not designed to directly influence the rate hearings."

8. The complainant also points out that with regard to the PSC's 1980 generation capacity hearings, a final decision was issued on May 20, 1983. The complainant states that this ruling did not make a final determination with respect to "a proposal" to cancel Callaway I. Instead, the PSC ordered interested parties to comment on the need for Callaway I in another proceeding.[7] Therefore, the complainant asserts, the PSC's May 20, 1983 decision establishes that the issue of the need for Callaway I still must be resolved in the regulatory process.

9. Finally, the complainant argues that the Bureau had misinterpreted its arguments with respect to its introducing evidence on the cancellation of Callaway II. "Yes" states that this information was presented to cast doubt on the licensee's conclusion that the issue of need was settled. The complainant states that the cancellation of Callaway II "was part of a nationwide trend of nuclear plant cancellations," and that these cancellations, of which the licensee was aware, raised questions as to the need for Callaway I. Therefore, the complainant asserts, the licensee ignored relevant material and too narrowly construed the prevailing circumstances when making its assessment as to whether the need issue should be subject to the Fairness Doctrine.

10. In its opposition, the licensee contends that the complainant was wrong for concluding that the Bureau had "focus[ed] solely on the regulatory issues and ignor[ed] newspaper clippings" in its determination of whether there was a current public debate on the need for Callaway I.[8] With regard to the newspaper clippings, the licensee states that the Bureau, in its ruling of December 1, 1982, "found that the broadcast spots did not address the issue discussed in the clippings." (Footnote omitted.)

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[7] The complainant has included two articles from the *St. Louis Post-Dispatch* (dated May 21 and 22, 1983) which discuss the PSC's May 20, 1983 decision.

[8] In its opposition, the licensee states that it does not agree with the Bureau's conclusion that the subject spots "meaningfully and obviously" addressed the issue of the "need for, and desirability of, the Callaway nuclear plant." Yet, for purposes of responding to the Application for Review, it has assumed this determination to be correct.

11. With respect to the complainant's argument that the May 20, 1983 decision by the PSC demonstrates that the need issue has not been resolved by the regulatory process, the licensee asserts that this decision provides no basis for disturbing the Bureau's ruling. The licensee points out that since the Bureau had no opportunity to consider the PSC's decision, which was issued prior to the Bureau's July 1983 ruling, the proper method of raising new factual or legal issues is by a Petition for Reconsideration. Therefore, it concludes, the May 20, 1983 PSC decision is not a proper basis for appealing the Bureau's ruling. Furthermore, the licensee asserts that statements made in a May 1983 decision have no bearing on whether a controversial issue of public importance existed in 1981-1982.

12. In reply to the licensee's opposition, the complainant states that, contrary to KTVI's assertion, the newspaper clippings do address the same issue as discussed by the subject spots. As an example, the complainant refers to a January 31, 1982 newspaper article which quoted UE's vice president for rates as saying, "The PSC could allow only part of Callaway's costs in the rate base on the ground that not all of the capacity is needed in 1984." The complainant asserts that this article, which appeared during the time period when the subject spots were aired, "clearly discuss[ed] the issue of need for Callaway." The complainant also contends that its complaint "offered many examples of UE's previous public statements and publications which explicitly discuss the need for energy, nuclear power and Callaway."

13. In addition to the foregoing articles, the complainant refers to its June 29, 1982 response as further evidence of newspaper articles which it had submitted that discuss the need for Callaway I. Specifically, the complainant refers to a May 6, 1982 *St. Louis Post-Dispatch* editorial and to various articles concerning the cancellation of Callaway II. The complainant alleges that all of the foregoing newspaper articles establish that need was the subject of vigorous debate in the St. Louis community, and concludes that both the licensee and the Bureau erred in their findings.

14. With regard to the May 20, 1983 generation capacity hearing decision, the complainant states that this decision illustrated that the issue of need was an unresolved question at the time the subject spots were aired. The complainant requests that its Application for Review be treated as a Petition for Reconsideration to the extent that the May 20, 1983 PSC decision is critical to the outcome of this case.

Discussion

A. Controversial Issue of Public Importance and Standard of Review

15. This case represents an intricate application of the Fairness Doctrine. Throughout this proceeding the complainant has focused its case, both as to evidence and the framing of the alleged controversial issue, on those events surrounding one particular nuclear plant located approximately 100 miles west of St. Louis, Missouri. We are not unmindful that the need for nuclear power is an issue that has taken on a national identity during the past several years and at various times in different communities has been the subject of controversy. However, complainant does not allege that the spots in question address the national issue of need for nuclear power. It is incumbent on the complainant to specify the alleged controversial issue of public importance and to introduce evidence which it determines is relevant to that issue. It is not the proper role of the adjudicatory body to frame the issues or to seek and introduce the evidence on which it must pass. *Reconsideration of the Fairness Report*, 58 FCC 2d 691, 696 (1976). The complainant has limited its allegations and evidence to the issue of "the need for, and the desirability of, the Callaway nuclear plant."[9] Accordingly, our findings are limited to the need issue as it pertains to Callaway.

16. The complainant asserts that in applying the Fairness Doctrine the Bureau erred because it too narrowly defined "controversial" as depending on whether an issue is unresolved in the regulatory process. In reviewing complaints under the Fairness Doctrine, the Commission is limited to deciding whether a licensee has acted reasonably and in good faith. *Fairness Report*, 48 FCC 2d 1, 9 (1974). When examining the "controversial" nature of the regulatory process, the Commission's proper role is to determine whether the licensee's decision — based on the facts and circumstances before it — was reasonable and made in good

[9] The complainant has only made bare, unspecified references to a national debate on nuclear power. In the complainant's letter filed July 9, 1982 it stated: "In regards to Callaway, as the public has become aware of costs and the risks of nuclear power, the questions of whether construction of Callaway needs to continue, or whether Callaway needs to be operated, has taken on even greater importance." The complainant also states in the same letter, "This material [referring to newspaper clippings] is an example of our experience that, in the debate about Callaway in particular, individuals and groups supporting nuclear plants argue that 'Despite the problems' (if they admit there are any problems or difficulties) we need the energy." In its application for review the complainant states, "The cancellation of Callaway was part of a nationwide trend of nuclear plant cancellations." We do not regard the foregoing as expanding complainant's "need for Callaway" issue.

faith.[10] More, and the Commission would impermissibly substitute its judgment for the licensee's. We find the Bureau applied the proper standard of review to the facts of this case. Further, we clarify the Bureau's ruling as to the definition of controversial in this case.

B. Bureau's Application of the Standard of Review

1. Campaign Materials and Newspaper Articles

17. We first examine the campaign materials and newspaper articles submitted by the complainant that it alleges establish that "the need for, and desirability of, the Callaway nuclear plant" was subject to vigorous debate in the St. Louis community. We cannot find the licensee unreasonable in concluding otherwise.[11] The campaign materials refer to Proposi-

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[10] In the *Fairness Report*, 48 FCC 2d at 11-12, the Commission specified the factors a licensee is to examine when assessing whether an issue is "controversial."

> [I]t is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. Furthermore, the licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another.

[11] The complainant's April 13, 1982 complaint contained the following newspaper articles and campaign materials.

> A November 30, 1980 advertisement in the *St. Louis Post-Dispatch* entitled "An Open Letter to all Missourians Regarding Proposition 11."
>
> An advertisement by scientists and physicians urging "*Stop* the Shutdown of Missouri's Nuclear Energy Plant. Vote *No* on 11."
>
> A December 10, 1981 *St. Louis Post-Dispatch* article entitled "Group Seeks Curb on Nuclear Plant."
>
> A January 31, 1982 *St. Louis Post-Dispatch* article entitled "UE Foresees 84 Hike of $400 Million."
>
> A February 1, 1982 *Globe-Democrat* article entitled "Some Similarity Between UE, N.Y. Nuclear Plants."

The complainant's July 9, 1982 response included the following newspaper articles:

> An April 2, 1981 *St. Louis Post-Dispatch* article entitled "UE Postpones Completion of 2nd Nuclear Unit to 1990."
>
> A September 6, 1981 *St. Louis Post-Dispatch* article entitled "UE Says It May Drop 2nd Nuclear Plant."
>
> An October 9, 1981 *St. Louis Post-Dispatch* article entitled "UE Cancels Callaway Nuclear Plant's 2nd Unit."
>
> A May 6, 1982 *St. Louis Post-Dispatch* editorial entitled "For a Hard Look at Callaway."

The complainant's February 23, 1983 letter included the following newspaper articles:

> An August 19, 1982 *Globe-Democrat* article entitled "Callaway Delayed Again."
>
> An August 19, 1982 *St. Louis Post-Dispatch* article entitled "Opening of UE's

tion 11, a ballot referendum in the November 1980 general election. The first series of spots did not begin to run until October 1981 and did not discuss a November 1980 ballot issue. We thus cannot find the licensee unreasonable in not considering these materials in determining whether the need issue was subject to vigorous debate in the St. Louis community at the time the subject spots were aired.

18. The December 10, 1981 *St. Louis Post-Dispatch* article discussed the formation of the "Yes Committee" and its November 1982 proposed ballot issue on nuclear waste storage. The Bureau's December 1, 1982 ruling (see Appendix A, p. 6) found that the licensee was not unreasonable in determining that the spots in question did not address the waste storage issue posed in the 1982 ballot referendum. We agree and do not find the licensee unreasonable in determining that the article was not germane to the need issue.

19. As to a January 31, 1982 *St. Louis Post-Dispatch* article on the projected rate increases for 1984, the Bureau found that the licensee was not unreasonable in concluding that the subject spots did not address a current controversy concerning the rate base hearings because, at the earliest, rate base hearings to address the Callaway need question would not occur until the following year.[12] We agree with the Bureau's ruling.[13] In addition, we cannot find the licensee unreasonable in concluding that the above-referenced article, which mentions the future rate base hearings, is not sufficient to establish that a controversy then existed in the community concerning the need issue that might be addressed in those proceedings.[14] Although it is conceivable that in some instances there could be substantial controversy this far in advance of hearings, the evidence proffered by complainant here was insufficient to render

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Callaway Plant will bring 50 Percent Rate Hike."

An August 24, 1982 letter to the editor entitled "Can Callaway."

[12] See paragraph 14 of the Bureau's July 19 ruling (Appendix A) for further details.

[13] In this connection, we note that the February 1, 1982 *Globe Democrat* article, which discusses the adequacy of Callaway's cooling system, raises concerns about a controversy that, if it would occur at all, would not, according to the article, ripen until after the Callaway plant is in operation. Also, the two August 19, 1982 articles address the rate hikes that UE intends to seek as a result of construction delays. According to the articles, the earliest that UE would submit these rate hikes to the PSC would be eleven months prior to the plant becoming operational, which was predicted to be late 1984 or early 1985. We note from the information before us that it is unclear whether these articles appeared prior to, during, or after the airing of the third series of spots.

[14] In any event, we do not believe that the subject matter and timing of the future rate proceedings would be dispositive of the question of need being a controversial issue of public importance. In our view this is not a conclusive factor; but it is relevant in reaching a determination. *See also* paragraph 24, *infra.*

unreasonable the licensee's judgment that no vigorously debated controversy then existed. *See* paragraph 24, *infra.*

20. Finally, with respect to the May 6, 1982 *St. Louis Post-Dispatch* editorial which ran during the airing of the second series of spots, the complainant alleges that this editorial specifically questioned the need for Callaway. This editorial did, in fact, question the need for Callaway. Nevertheless, we do not find the existence of one newspaper editorial which addresses the subject issue, by itself, establishes that the licensee was unreasonable in concluding that the issue of need was not in controversy at the time of the broadcasts in question.[15] We have held that controversy is established by demonstrating that vigorous debate exists between substantial elements of a community. *Fairness Report,* 48 FCC 2d at 12. This editorial (which discusses the issue of need but makes no reference to community interest in that issue) does not satisfy that burden.

2. Rate Base Hearings and May 20, 1983 PSC Decision

21. The complainant also asserts that since the question of need will be examined in the upcoming rate base hearings, this occurrence establishes that the question of need is still unresolved in the regulatory process and, therefore, must be considered a current controversy. As we have stressed previously, whether a particular issue is a current controversy subject to the Fairness Doctrine is a determination initially made by the licensee. Our review is limited to finding whether the licensee acted reasonably and in good faith. Here the licensee determined that the subject ads did not address a current controversy because questions regarding the issue of need had already been resolved through the process of UE acquiring the necessary permits to construct Callaway. "Yes" has presented no additional information or arguments to suggest that the Bureau erred in its finding that the licensee was not unreasonable. In this connection, we note that the complainant has repeatedly indicated throughout this proceeding that it also did not believe the subject spots were designed to influence the future rate base hearings. Moreover, even if need would again be at issue in those future hearings, we have no basis in the evidence to find that the licensee was unreasonable in concluding that there was no sustained controversy over need throughout the entire period of construction. *See* paragraph 25, *infra.*

22. The proper vehicle for submitting facts which the Bureau has not had an opportunity to consider is by a Petition for Reconsideration. To the

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[15] We note that the August 24, 1982 letter to the editor discusses the need for Callaway. It is unclear from the evidence before us whether this article appeared prior to, during, or after the airing of the third series of spots (see footnote 13). Nevertheless, the May 6, 1982 editorial and this letter to the editor will not suffice, by themselves, to establish a controversial issue of public importance.

extent that the PSC's May 20, 1983 decision is relevant to the outcome of this proceeding, the complainant requests that its Application for Review be treated as a Petition for Reconsideration. Section 405 of the Communications Act of 1934, as amended (47 U.S.C. § 405), and Section 1.106 of the Commission's rules (47 C.F.R. § 1.106) require that Petitions for Reconsideration must be filed within thirty days from public notice of the relevant decision. The Bureau's last ruling in this matter was mailed to the complainant on July 19, 1983, and its Application for Review was not received by the Commission until August 22, 1983, three days after the thirty-day filing period. Absent a showing of extraordinary circumstances, the Commission is without authority to accept late filed petitions for reconsideration. *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976); *The Ridgewood Group*, 79 FCC 2d 588 (1980). "Yes" has made no such showing. Consequently, pursuant to 47 U.S.C § 405, the complainant's request to treat its Application for Review as a Petition for Reconsideration is denied.[16]

23. Even if we were to consider the PSC's May 20, 1983 decision, we affirm the Bureau. As of October 1981, when the first series of spots began to air, approximately three years had elapsed since all the proceedings associated with UE receiving the necessary construction permits to build Callaway I had been concluded (see footnote 3). In fact, by the time the first series of spots ran, construction of Callaway I was substantially underway (see Appendix A, footnote 11). As of October 1981, a final decision in the generation capacity hearings had been pending for over one year (see footnote 4). There is no information before us to suggest that these hearings, especially with respect to the evidence submitted on the need for Callaway I, had been subject to vigorous debate (see footnote 9) around the time the first series of spots aired. In this regard, the licensee states that, when it aired the first series of spots, the possibility of the need issue being reopened in the generation capacity hearings was "too remote" to create a current controversy. We find this to be a reasonable judgment that we will not overturn: at the time the first series of spots aired, construction of Callaway I had already been authorized by the PSC and was substantially completed; the outcome of the generation capacity hearings was uncertain[17]; and there was no evidence which established that such hearings were subject to vigorous debate at that time. In sum, neither the campaign materials or newspaper

[16] However, the 30-day requirement for filing applications for review is not statutory, but is administratively set by the Commission. We can accept late-filed applications if the delay is de minimis, as in the situation here.

[17] In this connection, we note that it was 20 months after the airing of the first series of spots before the PSC rendered its decision. Moreover, that decision still did not resolve those concerns that were introduced into evidence on the need for Callaway I. Instead, that issue was apparently joined in another proceeding pending before the PSC.

articles, nor the 1983 PSC decision demonstrate that the licensee erred in deciding that the need for Callaway was not a controversial issue of public importance at the time the spots aired.

24. In upholding the Bureau's application of the standard of review we emphasize that neither UE's receipt of the necessary authorizations to construct a nuclear power plant nor its commencing construction on that plant, taken alone or together, rules out the possibility that need might still have been a controversial issue. These facts are pertinent to whether the issue is controversial, but not decisive. To the extent that the Bureau's determination of controversiality focused on these two facts, we hereby clarify it. But we reaffirm the Bureau's finding that at the time the spots were aired, the licensee was reasonable in determining that need was not a controversial issue of public importance. As noted earlier, only when issues are "subject to vigorous debate with substantial elements of the community in opposition to one another"[18] will they be subject to the fairness doctrine. Here, the complainant on review has failed to evidence such debate at the time in question, or that the licensee was unreasonable in acknowledging such debates.

25. We add that we could conceive of circumstances where the need for a nuclear power plant, even the Callaway facility, could well be controversial issue, even after a plant is in operation.[19] Under the fairness doctrine, an issue cannot be permanently categorized as controversial or noncontroversial. An issue hotly debated at one time may summon only apathy at another. Here however, we have insufficient evidence to overturn the licensee's judgment in deciding the controversiality of need as to Callaway. It is inappropriate for the Commission to assume controversiality where the profferred evidence is not sufficient.

3. Other Matters

26. One other matter requires comment. We find no merit to the complainant's assertion that the licensee too narrowly construed, and the Bureau erred in assessing, its evidentiary submissions on the cancellation of Callaway II.[20] The licensee had concluded that any concerns with respect to Callaway II were effectively "mooted" when this plant was cancelled, approximately three weeks prior to the airing of the first series of spots. Since the subject spots did not address the cancellation of Callaway II, and the complainant has not presented any additional evidence to suggest otherwise, we find no basis to conclude that the

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[18] *Fairness Report*, 48 FCC 2d at 11-12.

[19] In this connection, we note that "Yes" is promoting a new ballot issue for the 1984 general election concerning Callaway I, which raises the issue of need. Also, the upcoming rate base hearings may establish the need issue as controversial.

[20] The complainants July 9, 1982 pleading included three newspaper articles from the *St. Louis Post-Dispatch* on the cancellation of Callaway II.

Bureau erred in determining that the licensee's treatment of the Callaway II cancellation evidence was reasonable.

27. In view of the foregoing the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

8330-D

APPENDIX A

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Complaint of
Yes To Stop Callaway Committee
against
Television Station KTVI St. Louis, Missouri

Staff Ruling

Adopted: July 14, 1983; Released: July 19, 1983

BY THE CHIEF, FAIRNESS/POLITICAL PROGRAMMING BRANCH:

1. The Commission has before it a Fairness Doctrine complaint filed by the Yes Committee (now the "Yes to Stop Callaway Committee")[1] against television station KTVI, St. Louis, Missouri.[2] Complainant alleged that the licensee aired numerous issue advertisements which

[1] The present purpose of the committee, according to complainant, is to promote a ballot issue for the November 1984 general election. The proposed ballot issue will be:

A nuclear power plant may not be operated in this state.

[2] On December 1, 1982, we ruled on several elements of the complaint, but requested further information from the licensee regarding certain aspects of this matter. A copy of that letter is attached (Appendix). The following pleadings were filed in this matter:

April 13, 1982	Yes Committee's complaint against KTVI
May 6, 1982	Commission inquiry regarding complaint
June 14, 1982	Licensee response
July 9, 1982	Yes Committee's reply
January 7, 1983	Licensee's response to further inquiry of December 1, 1982
February 23, 1983	Yes Committee's reply
March 16, 1983	Licensee's further response
March 25, 1983	Yes Committee's further reply

addressed only one side of a controversial issue of public importance.[3] It defined that issue as "the need for, and the desirability of, the Callaway nuclear plant." Complainant contended that as regular viewers of "essentially all the news and public affairs of programming over the past eight months," its members "were not aware of any contrasting programming." In its response, the licensee stated that it was of the opinion "that the announcements [did] not take a position on either the need for or the desirability of the plant."[4]

2. In our initial ruling of December 1, 1982, the Bureau examined whether or not the subject spots addressed the issue of the need for, and desirability of, the Callaway nuclear plant. The Bureau found that the subject spots addressed this issue in an obvious and meaningful manner and accordingly the licensee was found unreasonable in concluding otherwise. Nevertheless, we asked for more information to determine whether the stated issue was controversial at the time the subject spots were aired,[5] which is a necessary element for establishing a *prima facie* fairness case. Specifically we requested more information about upcoming rate hearings which were to focus on whether Union Electric will be able to include its construction costs in its rate base and thereby pass on these costs to its customers. We would then be able to determine whether the subject spots discussed the issue as it relates to the upcoming rate hearing.

3. In its January 7, 1983 response to our letter of December 1, 1982,[6] the licensee states that the question of need for the plant had been conclusively settled by the time the spots in question were broadcast,[7] (see Appendix, page 5, n.10) and, therefore, it was "reasonable for the station to conclude that the spots did not address an issue as to which an open question remained." The licensee contends that neither at the time of the broadcasts (nor at the present time) was there a rate hearing being held regarding Callaway Unit I, and that only when construction is completed, which is now projected to be the first quarter of 1984, will a hearing be held with regard to Callaway Unit I. The licensee also argues that any concerns regarding Callaway Unit II are moot because Union Electric decided to cancel the plant three weeks prior to the airing of the first series of spots. The licensee states it is aware of an upcoming

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[3] The complaint of April 13, 1982, asserted that the issue advertisements consisted of thirty-second spots which were aired approximately 200 times by KTVI from October 1981 through February 1982. (See Appendix at 4-5.) In a subsequent pleading of July 9, 1982, complainant alleged that an additional seventy-five spots, similar in content and length to the first series, were aired from April 26, 1982 to June 6, 1982. In addition, in its February 23, 1983 pleading, complainant stated that an additional twenty-five spots were aired in August 1982. All of these spots will be considered herein.

[4] The Appendix contains a complete summary of the complainant's allegations and the licensees' responses for those pleadings received through July 9, 1982.

[5] With regard to the Yes Committee's proposed benefit referendum for the November 2, 1982 general election, we found that KTVI was not unreasonable in concluding that the spots in question did not have an obvious and meaningful relationship to the ballot issue, which addressed storage of radioactive waste.

[6] In responding to our letter, KTVI emphasizes that it does not agree with our finding that it was unreasonable in determining that the subject spots did not address the need for the Callaway plant. It states, however, that for purposes of responding to the Bureau's concerns, it assumes that this finding is correct.

[7] In this regard, KTVI submits that the Missouri Public Service Commission's (PSC) Report and Order was affirmed by the Circuit Court of the County of St. Louis, Missouri in *State of Missouri v. Public Service Commission*, Case. No. 367749 (Jan 7, 1976), *aff'd sub nom. State Ex Rel Utility Consumer Council v. Public Service Commission*, 562 S.W. 2d 688 (1978).

rate hearing on Callaway Unit II, but it contends that the question to be answered in that hearing, which pertains to recovery costs for this cancelled plant, "is neither posed nor discussed in the spots." The licensee further argues that Union Electric's request for the Callaway II hearing did not occur until December 3, 1982, several months after the airing of the subject spots. Finally, with regard to the upcoming hearing on the need for generating capacity, the licensee asserts that "the question of need is closed" upon the issuance of the construction permits. Even so, the licensee contends it "acted reasonably [by] determining that the spots did not address an issue of current controversy" because the earliest time that the generating capacity hearing could commence would be in the first quarter of 1984.

4. In its reply, complainant asserts that determining whether an issue is subject to the Fairness Doctrine, "is not solely a function of whether the issue is a subject of regulatory hearings . . .." It argues that the subject advertisement discussed the issue of need in a broad manner. In support, complainant includes newspaper articles from August 19, 1982, which discussed the Union Electric announcement regarding a delay in the construction of Callaway and a cost increase of $750 million. Complainant contends that these articles clearly discuss the issue of need for Callaway.

5. With regard to the upcoming rate hearing on generating capacity, complainant asserts that the licensee is wrong in contending that the issue of need has been conclusively settled by the regulatory process. Citing the Iatan decisions,[8] complainant alleges that the issue of need will be examined when the PSC determines whether the construction costs of Callaway should be included in Union Electric's rate base.[9] In addition, complainant argues that the Union Electric generator expansion hearings, which were held in 1980, demonstrate that the issue of need for Callaway is still an open question because the PSC still has not rendered a decision in that matter. Complainant asserts that the cancellation of Callaway II demonstrates that the need for Callaway has not been resolved, especially when the decision to cancel Callaway II is considered in conjunction with the generator expansion hearing and the upcoming rate hearing. It also argues that the timing of the ads illustrates that need is a controversial issue of public importance. Complainant states that the first series of advertisement ran just three weeks after Union Electric announced that construction would be delayed for Callaway I, that a $500 million cost increase would occur and that Callaway II would be cancelled. It asserts that the second series of spots were run "in the midst of the Yes Committee['s] petition drive, which had as its object the stopping of Callaway." Complainant also alleges that in August

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[8] In the Iatan decisions, the Missouri PSC determined, *inter alia*, whether the Kansas City Power & Light Company could include the cost of Iatan Unit I (Iatan Unit I is a "600 megawatt coal-fired power plant") in its rate base. In the initial Iatan decision, Case No. ER-80-48, p. 20 (July 2, 1980), the PSC found that the utility company could "provide safe and adequate service to its ratepayers without Iatan in its rate base and that therefore Iatan is not needed to meet the needs of the Company's ratepayers during the period these rates will be in effect."

In a subsequent decision, Case No. ER-81-42, p. 38 (July 3, 1981), Iatan was included in Kansas City Power & Light Company's rate base because new information led the PSC to conclude that the Iatan unit was "reasonably necessary for the provision of safe and adequate service to Company's ratepayers."

Both of the foregoing Iatan decisions along with a third decision which also addressed the Iatan unit's effect on the Kansas City Power & Light Company's rate base, Case No. ER-82-166 (July 24, 1982), were submitted by the licensee with its March 16, 1983 pleading.

[9] See Appendix, page 3, n.6.

1982, Union Electric ran another twenty-five spots (which were similar to the second series), and these spots were aired immediately preceding another announced delay of Callaway I and a $750 million cost increase. Complainant states, that at the time of these announcements, Union Electric "publicly acknowledged that Callaway I would result in at least a 50% rate hike."

6. In response to complainant's reply, the licensee asserts, "[T]he question of whether need may be considered in a rate base hearing once a certificate of public convenience and necessity has been issued is not settled," because that question, which was to be resolved on appeal, was dismissed before the appellate court could address it. The licensee argues that since the rate hearing will not be held until at least 1984, broadcasts in 1981 and 1982 could not have addressed a current controversy. The licensee states that unlike the Iatan cases, "there is no indication that Callaway I is in excess of the company's needs for additional generating capacity," and there is no "record that the utility acted imprudently in going forward with the construction of Callaway I." The licensee also asserts that the portion of the 1980 Union Electric generator expansion hearings which focused on Callaway II was effectively terminated when the company cancelled its plans to construct Callaway II. Finally, with respect to whether the need for Callaway I was an open question in the generator expansion proceedings, the licensee states that "[w]hile the Public Service Commission issued no opinion in that case, it is our understanding that no further action is expected." It concludes that "as a practical matter, the question of need for Callaway I is not open in that proceeding."

7. In a further reply, complainant alleges that the licensee has made a "major concession" regarding need being a controversial issue of public importance because of its assertion that this issue is still unresolved for purposes of addressing it in upcoming rate hearings. It asserts that the licensee's argument concerning the projected scheduling of the rate base hearings serves to trivialize the significance of the local debate surrounding the issue.

Discussion

8. As we stated in our letter of December 1, 1982, in assessing Fairness Doctrine complaints, the Commission's appropriate standard of review is limited to a determination of whether the licensee has acted reasonably and in good faith. *See* Appendix, page 4; *Fairness Report*, 48 FCC 2d 1, 9 (1974). Such decisions by licensees will encompass situations where reasonable men may differ on the appropriate treatment of a particular issue. The Commission will not attempt to "second guess" the journalistic judgments of a licensee, so long as those judgments are reasonable and made in good faith. *Environmental Defense Fund*, 90 FCC 2d 658, 660 (1982).

9. In our December 1, 1982 letter, we found that KTVI was unreasonable in concluding that the spots in question did not address the need for the Callaway nuclear plant. We did, however, find that such spots did not obviously and meaningfully address the proposed ballot issue (which concerned itself with storage of radioactive waste) for the November 1982 general election. We also requested more information to determine whether "the need for, and the desirability of, the Callaway nuclear plant" was a current controversial issue of public importance at the time the subject spots were aired. Based on all the information before us, we find that the licensee was not unreasonable in determining that the stated issue was not a controversial issue of public importance at the time of the broadcasts in question.[10]

[10] In making this determination, we are addressing only those spots and circumstances which existed up to and including the airing of the third series.

10. Initially, in terms of obtaining the requisite construction permits and certification to build the plant, we cannot find unreasonable the licensee's determination that the issue of need had already been decided by the regulatory process. Union Electric had been granted all of the necessary construction permits and certification by 1977, and all legal appeals regarding the plant's authorization had been resolved by 1978. Furthermore, it appears that the Callaway Nuclear Plant was substantially complete about the time the first series of spots were aired.[11] It thus appears that the regulatory process had taken its course with regard to authorizing the necessary permits for construction of the Callaway plant and, therefore, we cannot find KTVI unreasonable in determining that the question of need had been resolved through the regulatory process and was not a controversial issue of public importance at the time of the broadcast in question. See paragraphs 13 and 14 below for discussion of need as it relates to the future *rate* hearing.

11. With regard to the PSC's 1980 hearings,[12] which addressed Union Electric's generating capacity, it appears that no further proceedings will be held and that a final decision with regard to Callaway I has yet to be rendered.[13] The complainant has made no showing which indicates that these proceedings can be reopened or will be reopened, or that the question of the need for Callaway I will be reexamined in such a proceeding. Under these circumstances we cannot find the licensee was unreasonable in concluding that the question of need is not an open issue in that proceeding.[14]

12. Complainant also argued that Union Electric's decision to cancel Callaway II is another factor which demonstrates that the issue of need had not been resolved for Callaway I. We disagree. The decision to cancel Callaway II occurred three weeks prior to the airing of the first series of spots and no mention of the cancelled plant was made on any of the three series of spots. Therefore, we cannot find the licensee unreasonable in concluding that any concerns as to Callaway II were rendered "moot" by its cancellation, particularly where the subject spots do not obviously and meaningfully address the proposed second nuclear plant. *Fairness Report*, 48 FCC 2d at 12-13.

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[11] A December 10, 1981 St. Louis Post-Dispatch article submitted by complainant indicated the plant was approximately 78% complete as of that date.

[12] Complainant states that the PSC "held a series of hearings (sui generis) on UE's generating capacity," where it examined Union Electric's need for more power plants and Union Electric's method of forecasting electrical demand.

[13] In this connection the licensee asserts that no further action is expected in this proceeding and, therefore, believes that no final decision will ever be rendered with respect to Callaway I.

[14] Complainant also argues that the timing of the series of subject spots demonstrates that need is a controversial issue of public importance. With respect to the cost increase and construction delay announcements occurring close to the first and third series of spots, complainant still has made no showing which contravenes the licensee's determination — that the issue of need was resolved in the regulatory process. In addition, complainant has failed to demonstrate that these announcements could potentially reopen the question of need in the regulatory process. Therefore, we cannot find the licensee to be unreasonable for not determining need to be a controversial issue of public importance as a result of the proximity of Union Electric's announcements to the airing of the subject spots. Also, with respect to the second series of spots airing at the same time as the Yes Committee's petition drive for its proposed ballot issue in the 1982 general election, we have already held that the subject spots did not discuss the proposed ballot referendum (regarding nuclear waste disposal) in an obvious and meaningful way.

13. Finally, complainant asserts that the upcoming rate hearings (to be held when construction is completed and the plant is operational) is evidence that the question of need for Callaway I is still an open question and thus a controversial issue of public importance. In response to this allegation and the Commission's letter of December 1, 1982, the licensee asserts that although the PSC may consider the need for additional capacity in the rate base proceeding, the question has not been resolved by the Missouri courts and, therefore, cannot be considered a settled point of law. It appears from the information before us that the PSC will, in fact, examine the question of need for Callaway's generating capacity when construction has been completed and the plant is in operation. At such time, if Union Electric decides to challenge the PSC's method of determining its rate base, it can pursue its remedies through the Missouri court system. However, the decision to appeal a binding decision by a state regulatory commission does not alter the fact that the issue of need will be addressed in the upcoming rate base hearings before the PSC.[15]

14. The question remains then — was the "need" issue, which would be relevant in a future hearing, a controversial issue of public importance at the time the spots were broadcast in 1981 and 1982? The licensee asserts that the subject spots did not address a current controversy with regard to the rate base hearings because they are at least *two years* away. To find otherwise, the licensee argues, would require licensees to speculate on their advertiser's motives, which would create an impossible task of review for the Commission. Complainant concurs with the licensee on this point when it states, "We also agree with KTVI that the ads were probably not designed to directly influence upcoming rate hearings, since the rate hearings were at least two years away."[16] The record before us indicates that on July 22, 1981, Union Electric requested from the NRC an extension of time within which to complete construction from February 28, 1982 to December 31, 1983. The NRC granted this request on December 21, 1981. Thus, at the time of the October 1981 broadcasts of the utility's spots, Union Electric had pending an extension of time request before the NRC. In addition, the rate base hearings cannot be held until the plant is fully operational. The earliest possible time this could occur, even if the utility's request for an extension was denied (there is no evidence on the record that a denial was probable), was sometime after February 1982. Therefore, considering the utility's pending request for an extension of time and the uncertainty in determining when the plant would be "fully operational," we cannot find the licensee unreasonable in concluding that at the time the spots began to run they did not address a current controversy.

15. In summary, by our letter of December 1, 1982, we found the subject spots did not address the Yes Committee's November 2, 1982 ballot issue on nuclear waste disposal in an obvious and meaningful manner. However, we did find the licensee unreasonable in concluding that the subject spots did not address the issue of "the need for, and the desirability of, the Callaway nuclear plant." Nevertheless, we still had to determine whether the licensee has

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[15] The licensee also asserts that the present case and the Iatan cases (*supra* at n.8) can be distinguished because unlike Iatan "there is no indication that Callaway I is in excess of the company's needs for additional generating capacity" and there is no evidence that Union Electric "acted imprudently in going forward with the construction of Callaway I." These statements involve factual conclusions that can only be determined by the Public Service Commission after it has received evidence on the issue of need in the upcoming rate hearings. Therefore, we find these arguments have no merit because the question of need will have to be examined by the PSC, which will decide whether Union Electric is in excess of its generating capacity or whether it has acted prudently.

[16] In this connection complainant also states, "At no time did anyone contend that the ads were designed to influence these rate hearings."

acted reasonably in concluding this was not a controversial issue of public importance at the time the subjects spots were aired. The licensee had ascertained that the regulatory process had already decided this issue. The licensee also did not focus on the upcoming rate hearings in reaching its decision about the current controversiality of the subject issue. We did not find these determinations to be unreasonable and conclude that the licensee was not unreasonable in determining there was no current controversy regarding the issue of "need" at the time the subject spots were aired.

16. Based on the foregoing, no further action is warranted on the complaint.

17. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of the letter (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)] by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

FEDERAL COMMUNICATIONS COMMISSION

MILTON O. GROSS, *Chief*
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

8330-D

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

December 1, 1982

Times Mirror Broadcasting
Licensee of Television Station KTVI
5915 Berthold Avenue
St. Louis, Missouri 63110

Dear Licensee:

This refers to the complaint filed April 13, 1982, by David Harris, campaign manager of the Yes Committee[1] against your television station,[2] alleging a violation of the Fairness Doctrine.

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[1] According to Mr. Harris, the Yes Committee is a nonprofit campaign committee registered with the Missouri Secretary of State, set up to promote a ballot issue for the November 2, 1982 general election. As indicated in an exhibit submitted with his original complaint, the proposed ballot issue was as follows:

> A nuclear power plant may be operated in this state only if an acceptable site (or sites) for the permanent storage of radioactive waste from the plant is capable of receiving such waste.

[2] The original complaint, which we received on April 13, 1982, was against stations KTVI and KSDK, St. Louis, Missouri. By letter, received June 14, 1982, Mr. Harris withdrew his complaint against KSDK.

You responded to our initial inquiry of May 6, on June 14, and Mr. Harris filed a reply to that response on July 9.

The complainant alleges that from late October 1981 through February 1982, KTVI has "carried issue advertisements which discussed just one side of a controversial issue of public importance."[3] He defines that issue as "the need for, and the desirability of, the Callaway nuclear plant." He further asserts that the Yes Committee "members include numerous regular viewers of [KTVI] . . . who watched . . . essentially all the news and public affairs programming over the past eight months." These members "were not aware of any contrasting programming." He also alleges that "[t]he ads explicitly mention the need for Callaway and their contents closely parallel a major argument advanced by partisans [of the proposed waste disposal ballot referendum] on the pro-Callaway side of the issue."[4] In addition, he argues that since these ads were aired while "the operating license hearings for the Callaway plant were taking place," while the proposed nuclear waste disposal ballot referendum was at issue, and at a time when "Union Electric has requested the largest rate increases in its history," he believes the opinion "that the ads seek to play an obvious and meaningful role in the ongoing public debate regarding the need for, and the desirability of, the Callaway nuclear plant."

In your June 14 reply, you state "that it is the station's view that the announcements do not take a position on either the need for or the desirability of the plant." You assert that "[n]either matter is directly addressed 'in an obvious and meaningful manner,' and we fail to see that either question is alluded to in a way that might be taken as expressing a viewpoint on the matter under debate." You declare that "if the announcements [did] address any issue, it is the issue of need," and that "the question of need . . . has long since been settled by the actions of the federal and state agencies that approved the construction of the plant in the mid-1970's." You allege that the Yes Committee has "not furnished any evidence of an ongoing debate in the community regarding the need for the plant, and we are aware of none." You claim that the "newspaper clippings [submitted with the initial complaint] . . . do not deal with the need for the plant, but with questions about the lack of [a] federally licensed waste disposal site at which to store and treat the nuclear waste for the plant."[5] As a result, you argue "the issue of need was not a controversial issue of public importance at the time of the broadcasts." Finally, you state that "the spots do not give rise to Fairness Doctrine obligations."

In the complainant's response to your reply, he states that since KTVI did not address the issue of desirability, its "silence on this issue effectively concedes that the desirability of the Callaway nuclear plant is a controversial issue of public importance and that the ads directly and substantially discuss this issue." He asserts that "KTVI also agrees that the need for Callaway is addressed by the Union Electric ads." He states that in determining whether fairness obligations arise under these circumstances, it is not dispositive to look at public agency rulings, but one must examine "whether need is a subject of public debate." Thus, Mr. Harris claims, that "as the public has become more aware of the costs and risks of nuclear

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[3] Mr. Harris indicated that these advertisements, which consisted of 30-second spots, were aired approximately 200 times. The text of the advertisements appear *infra.*

[4] The pro-Callaway argument regarding the waste disposal ballot issue, as the complainant defined it, is whether Callaway is "needed to reduce our dependence on foreign oil."

[5] In this regard, Mr. Thomas states that "we do not understand the Committee to be claiming that the spots in question address the waste disposal issue, or that the station has failed to offer adequate opportunity for the presentation of contrasting viewpoints on that issue."

power, the question of whether construction of Callaway needs to continue, or whether Callaway needs to be operated, have taken on even greater importance. There is in fact a significant public debate going on around the need for Callaway . . .." He also alleges that the need for the Callaway nuclear plant is still a controversial issue of public importance because the subject of need has been recently addressed in the local newspaper; "uncertainties about need and cost" caused Union Electric to cancel a proposed second nuclear plant at Callaway; the question of need is still an unresolved issue in proceedings before the Missouri Public Service Commission (PSC);[6] and the issue of need was addressed in the written material submitted with his original complaint.[7] He asserts that this material illustrates that in the debate regarding Callaway, "individuals and groups supporting nuclear plants often argue that, 'Despite the problems (if they admit there are any problems or difficulties) we need energy.' " He indicates "that the tagline of each of the ads clearly and explicitly link Callaway and energy need."[8] Furthermore, Mr. Harris states that "[t]hese ads clearly and explicitly make reference to a specific controversy when viewed in the context of the ongoing debate."[9] Finally, he asserts that the Union Electric ads discuss only one side of the stated issue "and that KTVI's response to the contrary addresses only a small part of the issue and ignores recent and ongoing debates about the plant." As a result, he requests the Commission "to find that KTVI has failed to comply with the Fairness Doctrine and to determine what the station is willing to do to fulfill its fairness obligations."

Under the Fairness Doctrine broadcasters presenting one side of controversial issue of public importance have an affirmative obligation to afford reasonable opportunity for the presentation of contrasting views. In reviewing complaints under the Fairness Doctrine, the Commission does not substitute its judgment for that of the broadcaster. Rather, the Commission considers whether the broadcaster has acted reasonably and in good faith. The Commission has stated in this regard:

> We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. [*Fairness Report*, 48 FCC 2d 1, 9 (1974); citation omitted.]

A complainant in alleging a fairness violation has the burden of establishing, *inter alia*, the particular issue involved; that such issue is controversial and of public importance; that the licensee has only presented one side of the issue; and that the licensee has failed to afford a

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[6] In this regard, the complainant notes that the issue of need for Callaway 1 and 2 was questioned in the hearings held by the PSC on Union Electric's generating capacity. In addition, he indicates that the PSC will examine the demand for electricity when it determines whether the construction costs can be included in Union Electric's rate base.

[7] Mr. Harris states that Appendix B of his complaint contains material which demonstrates "the desirability of Callaway, an issue which KTVI does not address." In addition, he alleges that "KTVI's view completely ignores the campaign material and other recent public statements of Union Electric."

[8] The "tagline" states "American coal and Callaway, to meet Missouri's energy needs."

[9] In addition to the subject ads, Mr. Harris states that KTVI has broadcast an additional 75 Union Electric advertisements since the original complaint (4/26/82 - 6/6/82), and alleges that these ads also "discuss the need for, and the desirability of, the Callaway nuclear plant." He asserts that he was given the "same negative response" that was given to his original fairness inquiry when he discussed these ads with KTVI. He has requested that we consider these additional spots as part of his Fairness Doctrine complaint. These spots appear to be similar in content to those originally complained of. Because of our findings herein, KTVI may wish to consider these further allegations in its response to this letter.

reasonable opportunity for the presentation of contrasting viewpoints in its overall programming. *Allen C. Phelps*, 21 FCC 2d 12 (1969). "Should the licensee reach different conclusions as to these matters, the Commission will review those judgments only to determine whether the licensee can be said to have acted reasonably and in good faith." *Media Access Project*, 44 FCC 2d 755, 758 (1973).

At the outset, it appears that you were unreasonable in determining that the ads in question do not address the issue of "the need for, and the desirability of, the Callaway nuclear plant." The spots in question read as follows:

SPOT NUMBER 1

1904, Union Electric provided electricity for the St. Louis World's Fair. The source of that power was our very first coal plant. Today, 95% of our electricity comes from American coal; and now we are building the Callaway Nuclear Plant so that we won't be dependent on any one energy source and not dependent on foreign oil at all. American coal and Callaway, to meet Missouri's energy needs.

SPOT NUMBER 2

Saudi Arabia, Quatar, Abundabi. For decades, America has relied on countries like these for our major energy resource, oil. But in Missouri, Union Electric has been using American coal to produce electricity; and now we are building the Callaway Nuclear Plant, another American energy source. American coal and Callaway, to meet Missouri's energy needs.

SPOT NUMBER 3

Electricity is vital to all of us. Where we live and where we work; for communications and recreation; in hospitals and in our schools. Union Electric has been using American coal to produce electricity for over 75 years. Now we are building the Callaway Nuclear Plant, another American energy source. American coal and Callaway, to meet Missouri's energy needs.

These three spots clearly address the need for construction of the Callaway nuclear plant as a means to: avoid reliance on any one energy source; avoid dependency on foreign aid; increase America's energy sources; and produce electricity for everyday use. As a result, it would be unreasonable for you to conclude that the spots did not obviously and substantially discuss "the need for, and desirability of, the Callaway nuclear plant" in an obvious and meaningful way. *Fairness Report, supra*, at 12-13. *See National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1108 (D.C. Cir. 1977). In addition, it appears that the "tagline" (set out in footnote 8) links the need for, and desirability of, the Callaway plant with Missouri's energy needs.

Although we find that you were not reasonable in determining that the subject ads do not discuss the issue as posed by the complainant, we still must determine whether you have acted reasonably and in good faith in judging that this issue was not a controversial issue of public importance.

You assert that the issue of "the need to build the plant, if ever a controversial issue of public importance, has long since been settled by the actions of the federal and state agencies that approved the construction of the plant in the mid-1970's."[10] As a result, you conclude that "the spots in question were broadcast long after the decisions had been reached that the plant was

[10] You state that Union Electric was granted certification by the PSC in April 1975, a construction permit from the Nuclear Regulatory Commission in April 1976, and a permit from the Army Corps of Engineers in November 1977.

needed." Furthermore, you state that you are not aware "of an ongoing debate with[in] the community regarding the need for the plant."

The complainant asserts that you were incorrect in concluding that the question of need is resolved because "[t]he principal question in determining KTVI's fairness obligations" is whether an issue is subject to debate and not whether there has been an adjudication by public agencies. Consequently, the complainant alleges that "[t]here is in fact a significant public debate going around the need for Callaway, a debate which KTVI completely ignores." The complainant further asserts the need for Callaway is still a controversial issue of public importance as evidenced by a "St. Louis Post-Dispatch" article of May 6, 1982, which questions the economic feasibility of the Callaway nuclear plant; the cancellation of a second nuclear unit by Union Electric three weeks prior to the airing of the spots in question; a pending decision of the PSC on Union Electric's generating capacity; an upcoming hearing on rate increases to cover construction costs; and the presence of arguments (in the spots) that have been previously used by those individuals and groups supporting nuclear plants.[11] Furthermore, the complainant argues that, "when viewed in the context of the ongoing debate about Callaway," (the operating license hearings, the "Yes" referendum and the rate hike requests) the subject spots incur fairness obligations.

Initially, we find you were not unreasonable in determining that the subject spots do not address the question of whether Union Electric should be permitted to operate the nuclear plant until a federally licensed waste disposal site is available and, therefore, the spots have no obvious and meaningful relationship to the Yes Committee's proposed ballot referendum. The spots do not make any reference to waste disposal. It is well established that in order for the Fairness Doctrine to be applicable, an issue must be discussed in an obvious and meaningful manner. *National Committee for Responsive Philanthropy v. FCC*, 652 F.2d 189 (D.C. Cir. 1981). If, in fact, Union Electric was attempting to influence the proposed ballot referendum through the subject spots, the Commission does not expect a licensee to determine what the actual intentions of its advertisers may be. *See Fairness Report, supra.* at 23. If the Commission were to require that a licensee examine the intentions and motivations of its advertisers when determining whether a controversial issue of public importance exists, such subjective decision making would undoubtedly result in unpredictable and arbitrary decisions. Thus, the Commission would be left with the impossible task of determining whether a licensee had made a reasonable determination as to the "true" intentions of a particular advertiser. *See Environmental Defense Fund*, 90 FCC 2d 658 (1982). Fairness Doctrine obligations arise only where advertisements contribute in an obvious and meaningful manner to the public debate on a controversial issue of public importance.

We are unable to determine, however, the reasonableness of your assertion, that the issue of need for the Callaway plant has already been decided by the regulatory process and, therefore, is no longer a controversial issue of public importance. The complainant has stated that when construction of the nuclear plant is completed the PSC will examine the question of need as it relates to whether Union Electric can recover the costs of construction of Callaway by including it in its rate base.

Therefore, in order for the Commission to resolve the complainant's Fairness Doctrine concerns on the aforementioned rate hearings, please submit the following:

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[11] The complainant asserts that the connection between oil use, American energy sources and nuclear power was an argument used by Union Electric for the pro-Callaway side of the Fall 1980 referendum on nuclear waste disposal.

(a) A response to the complainant's assertion that the upcoming rate hearings will focus on whether Union Electric will be able to include its construction costs in its rate base and thereby pass on its costs to its customers. Your response should include an explanation as to whether the subject spots address the issue of "the need for, and desirability of, the Callaway Nuclear Plant" as they may relate to the upcoming rate hearings.

(b) If your answer to (a) concludes that the rate hearings will discuss the matters described by the complainant and the subject spots relate to the upcoming rate hearings, state whether you have afforded, or intend to afford, a reasonable opportunity for the presentation of significant contrasting viewpoints on this issue. Include an accurate summary of how you have done so or intend to do so. If you come to a contrary conclusion, explain in detail how you reached this determination.

You may also submit any additional information you believe will be helpful to the Commission in understanding this matter. Your response should be submitted within thirty days of the date of this letter, and must be signed by the licensee or an officer or director of the licensee's corporation. A copy of your response should be sent to the complainant.

If the complainant is not satisfied with your response and wishes to submit comments on it, complainant should file such comments within ten days of the date of your response. Should no comments be received from the complainant, it will be assumed the complainant does not wish to take issue with the licensee's response. In either event, the Commission will then determine what action, if any, is appropriate in light of the information before it. In order to expedite consideration of this complaint, we suggest that you and the complainant furnish each other with copies of all further correspondence sent to the Commission.

Staff action is taken here under delegated authority. In regard to the findings contained herein an Application for Review by the full Commission may be requested within thirty days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)] by writing the Secretary, Federal Communications Commission, Washington, D. C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

SINCERELY,

MILTON O. GROSS *Chief, Fairness/Political Programming Branch*
Enforcement Division
Mass Media Bureau

APPENDIX B

The first series of spot, which ran from October 1981 through February 1982, and the second series of spots, which aired from April 26, 1982 to June 6, 1982, are described as follows: The first series consisted of spots one through three and the second series consisted of spots four and five.

SPOT NUMBER 1

1904, Union Electric provided electricity for the St. Louis World's Fair. The source of that power was our very first coal plant. Today, 95% of our electricity comes from American coal; and now we are building the Callaway Nuclear Plant so that we won't be dependent on any one energy source and not dependent on foreign oil at all. American coal and Callaway, to meet Missouri's energy needs.

SPOT NUMBER 2

Saudi Arabia, Quatar, Abundabi. For decades, America has relied on countries like these for our major energy resource, oil. But in Missouri, Union Electric has been using American coal to produce electricity; and now we are building the Callaway Nuclear Plant, another American energy source. American coal and Callaway, to meet Missouri's energy needs.

SPOT NUMBER 3

Electricity is vital to all of us. Where we live and where we work; for communications and recreation; in hospitals and in our schools. Union Electric has been using American coal to produce electricity for over 75 years. Now we are building the Callaway Nuclear Plant, another American energy source. American coal and Callaway, to meet Missouri's energy needs.

SPOT NUMBER 4

A few years ago, right here at this Missouri site, a project began which will soon produce as much energy as a giant oil field, like this one, in Libya. That project in Missouri is the Callaway nuclear plant and it will produce as much electricity as a giant oil field; a total of 400 million barrels. And it will keep on producing electricity year after year, for Missouri's homes, offices, factories and farms. American coal and Callaway, to meet Missouri's energy needs.

SPOT NUMBER 5 (Only a partial transcript of this ad was submitted into evidence).

. . . The Callaway nuclear plant will produce as much electricity as 400 million barrels of oil. That's a lot. . . . If laid end to end, that is enough oil to stretch from St. Louis to Tehran and around the world ten times . . . American coal and Callaway, to meet Missouri's energy needs.